SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.....

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

VS.

MEXIA TEXTILE MILLS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX

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In the United States Court of Appeals
For the Fifth Circuit

12763

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
v.
MEXIA TEXTILE MILLS, INC.,
RESPONDENT.

Petition for Enforcement of an Order of The National Labor Relations Board—Filed April 11, 1949

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. (1946 ed.), Supp. I, Secs. 151 *et seq.*) hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against respondent, Mexia Textile Mills, Inc., its officers, agents, successors, and assigns. The proceedings resulting in said order are known upon the record of the Board as "In the Matters of Mexia Textile Mills, Inc. and Textile Workers Union of America, CIO, Cases Nos. 16-R-994 and 16-C-1301" respectively.

In support of this petition the Board respectfully shows:

(1) Respondent is a Texas corporation, engaged in business in the State of Texas, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matters before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on July 2, 1948, adopted the findings of fact, conclusions of law, and recommended order of the Trial Examiner as contained in the Trial Examiner's Intermediate Report, and entered the following order directed to the respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

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ORDER

On December 18, 1947, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in certain

unfair labor practices and recommending that it take specific action to remedy such unfair labor practices.

The case was transferred to the National Labor Relations Board on the same date. No Statement of Exceptions has been filed with the Board, and the time for such filing has expired.

Pursuant to Section 10 (c) of the National Labor Relations Act as amended and Section 203.48 of the National Labor Relations Board Rules and Regulations, Series 5, the Board hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as contained in the Intermediate Report and makes the following Order:

IT IS HEREBY ORDERED that the respondent, Mexia Textile Mills, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, CIO, as the exclusive representative of all production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Engaging in any other acts in any manner interfering with the efforts of Textile Workers Union of America, CIO, to negotiate for or represent, as their exclusive bargaining agent, the employees in the aforesaid bargaining unit.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request bargain collectively with Textile Workers Union of America, CIO, as the exclusive bargaining representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its plant in Mexia, Texas, copies of the Notice attached hereto and marked Appendix A. Copies of said Notice to be furnished by the Regional Director for the Sixteenth Region, shall be posted by the Respondent immediately upon their receipt, after being duly signed by a representative of the Respondent, and shall be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by other material;

(c) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the receipt of this Order, what steps Respondent has taken to comply herewith.

3. (3) On July 2, 1948, the Board's order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire records of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, its officers, agents, successors, and assigns to comply therewith. The Board further prays that this Honorable Court, in enforcing said order, shall provide that the aforementioned notice to be posted by respondent, marked "Appendix A," shall specifically recite that the Board's order has been enforced by a decree of this Court so that the introductory clause of the notice shall read as follows: "APPENDIX A, NOTICE TO ALL EMPLOYEES, Pursuant to a Decree of the United States Court of Appeals for the Fifth Circuit enforcing the Order of the National Labor Relations Board,

and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:"

NATIONAL LABOR RELATIONS BOARD
By /s/ A. NORMAN SOMERS
A. Norman Somers,
Assistant General Counsel

4 APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO AN ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT engage in any acts in any manner interfering with the efforts of TEXTILE WORKERS UNION OF AMERICA, CIO, to negotiate for or represent the employees in the bargaining unit described below.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, or other conditions of employment and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

MEXIA TEXTILE MILLS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

5 *Duly sworn in by A. Norman Somers.*
Jurat omitted in printing. (All in italics.)

6 In the United States Court of Appeals
For the Fifth Circuit

(Title Omitted)

Order to File Petition—Filed April 11, 1949

A Petition for the Enforcement of an Order of the National Labor Relations Board made on July 2, 1948, "IN THE MATTERS OF MEXIA TEXTILE MILLS, INC. AND TEXTILE WORKERS UNION OF AMERICA, CIO," Cases Nos. 16-R-994 and 16-C-1301, N. L. R. B., having been presented to this Court,

IT IS ORDERED that said Petition be filed and the case docketed as of April 11, 1949, and

IT IS FURTHER ORDERED that upon the filing with the Clerk, of a certified copy of a transcript of the proceedings of the National Labor Relations Board in the above entitled matter, the Clerk shall forthwith give Notice thereof to the said respondent.

(Signed) E. R. HOLMES
U. S. Circuit Judge.

Dated:
April 11, 1949.

20 Before the National Labor Relations Board

Case No. 16-R-994

In the Matter of
MEXIA TEXTILE MILLS, INC.
and
TEXTILE WORKERS UNION OF AMERICA, C. I. O.

Certification of Representatives

On November 8, 1944, an election was conducted in the above matter pursuant to the Board's direction of October 25, 1944 (58 N.L.R.B., No. 240), and in accordance with the Rules and Regulations of the Board. It appears from the Corrected Tally of Ballots that a collective bargaining representative has been selected, since of the approximately 186 eligible voters, 164 cast valid votes, of which 146 were for the Union, and 18 against, and the 1 challenged ballot is insufficient to affect the results of the election. No objections have been filed by any of the parties within the time provided therefor.

By virtue of and pursuant to the power vested in the Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of the Board's Rules and Regulations—Series 3, as amended.

IT IS HEREBY CERTIFIED that Textile Workers Union of America, C.I.O. has been designated and selected by a majority of all production and maintenance employees of Mexia Textile Mills, Inc., Mexia, Texas, excluding clerical employees, the carpenter in the spinning department, the regular gate watchmen, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D. C., this 18 day of November, 1944.

By direction of the Board:

JOHN E. LAWYER
Chief, Order Section

(SEAL)
R

23 National Labor Relations Board

First Amended Charge

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that MEXIA TEXTILE MILLS at Mexia, Texas employing 180 workers
(Name of employer) (Address of establishment) (Number),
in manufacture of cotton cloth has engaged in and is engaging
(Industry)
in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that
On November 22, 1944 it, by its officers, agents and employees, refused to bargain collectively with the authorized representatives of Textile Workers Union of America, C.I.O., choosen by a majority of its employees at its Mexia, Texas plant, to represent them for the purposes of collec-

tive bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

By the acts set forth in the paragraph above, and by other acts and conduct, it, by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

TEXTILE WORKERS UNION OF AMERICA, CIO
(Full name of labor organization or person filing charge)

(If labor organization, local name, number, and affiliation)

1010 Corinth Street, Dallas, Texas Harwood 2713
(Address) (Telephone number)

DO NOT WRITE IN THIS SPACE
Case No. 16-C-1301
Docketed Jan. 27, 1947

By HERSCHIEL E. MOORE
(Signature of person filing charge)

State Director
(Title, if any)

Subscribed and sworn to before me this 24 day of January, 1947, at Dallas, Texas, as true to the best of deponent's knowledge, information, and belief.

FRANCES M. SWIFT, *Notary Public*
Board Agent or Notary Public
In and For Dallas County

(SEAL)

(SUBMIT ORIGINAL AND THREE COPIES OF THIS CHARGE)

RW 1-28

24 Before the National Labor Relations Board

(Title Omitted)

Notice of Hearing

PLEASE TAKE NOTICE that on the 18th day of August, 1947, at ten o'clock in the forenoon in the American Legion Hall, New City Hall, in the City of Mexia, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to Section 203.16 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to said Complaint within ten (10) days from the service thereof, and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Sixteenth Region on this 27th day of June, 1947.

EDWIN A. ELLIOTT
Regional Director
(SEAL) *National Labor Relations Board*
1101 T & P Building
Fort Worth, Texas
(Address)

25 Before the National Labor Relations Board
Sixteenth Region
Case No. 16-C-1301
In the Matter
of
MEXIA TEXTILE MILLS,
and
TEXTILE WORKERS UNION OF AMERICA, CIO.

Complaint

It having been charged by Textile Workers Union of America, CIO, Dallas, Texas, that Mexia Textile Mills, Mexia, Texas, hereinafter referred to as respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 4, Section 203.11, hereby issues its complaint and alleges as follows:

1. Respondent is and has been at all times material hereto a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its prin-

cipal office and place of business in the City of Mexia, County of Limestone and State of Texas, and is now and has been at all the times herein mentioned continuously engaged at said place of business, hereinafter referred to as the "Mexia plant", in the manufacture, sale and distribution of cotton cloth and related products.

2. Respondent in the course and conduct of its business causes and has continuously caused a substantial amount of materials used in the manufacture, sale and distribution of cotton cloth and related products to be purchased, delivered and transported in interstate commerce from and through the states of the United States other than
26 the State of Texas to its Mexia plant and causes and has continuously caused a substantial part of the products manufactured, sold and distributed by it as a part of its business to be supplied, delivered and transported in interstate commerce to and through the states of the United States other than the State of Texas from its Mexia plant.

3. Textile Workers Union of America, CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2, subdivision (5), of the Act.

4. In order to insure to the employees of respondent the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act, all production and maintenance employees of respondent employed at its Mexia plant, exclusive of clerical employees, the carpenter in the spinning department, the regular gate watchmen, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employees, with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision (b), of the Act.

5. On or about November 8, 1944, a majority of the employees of respondent in the unit described above in paragraph four, designated or selected the Union as their representative for the purposes of collective bargaining with respondent and at all times since that date the Union has been the representative for the purposes of collective bargaining of a majority of the employees in said unit and, by virtue of Section 9, subdivision (a), of the Act, has

been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. On or about November 22, 1944, the Union requested respondent to bargain collectively in respect to rates
27 of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of respondent in the unit described above in paragraph four.

7. On or about November 22, 1944, and at all times thereafter, respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph four.

8. By the acts described above in paragraph seven, respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, subdivision (5), of the Act.

9. By the acts described above in paragraph seven, and by each of said acts, respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, subdivision (1), of the Act.

10. The activities of respondent, described above in paragraph seven, occurring in connection with the operation of respondent, described above in paragraphs one and two, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The acts of respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (5), and Section 2, subdivisions (6) and (7), of the Act.

WHEREFORE, the National Labor Relations Board on the 27th day of June, 1947, issues its complaint against Mexia Textile Mills, Inc., Mexia, Texas, respondent herein.

EDWIN A. ELLIOTT.

Edwin A. Elliott,

(SEAL) *Regional Director,*

National Labor Relations Board,

Sixteenth Region.

Before the National Labor Relations Board

(Title Omitted)

31 *Answer of Respondent*

Now comes MEXIA TEXTILE MILLS, Mexia, Texas, Respondent herein, and makes this answer to the complaint issued in the above cause and served on Respondent on June 28, 1947.

A MOTION FOR MORE DEFINITE STATEMENT

Respondent moves for a more definite statement of the facts and circumstances upon which the complaint is grounded and would show that no specification or notice of the acts of the Respondent alleged to constitute a refusal to bargain are contained in the complaint, the sole basis of the complaint being set forth in numbered Paragraph 7 thereof. In this connection Respondent would show that it has no actual knowledge of the acts and circumstances alleged to constitute a refusal to bargain. The language contained in numbered paragraph 7 of the complaint is a conclusion of the pleader couched in general circumstances involving the relations between Respondent and the union over a period of time amounting to two years and eight months. Respondent would show that the witnesses who may have knowledge of the facts and circumstances upon which the complaint is grounded are many and varied in number and that unless Respondent has notice and knowledge of the particulars, Respondent is unable to adequately prepare its defense and is deprived of the opportunity to apply to the Board for subpoenas and arrange for the attendance and production of its witnesses and that by reason thereof Respondent is denied the due process
32 of law guaranteed Respondent under the Constitution. Respondent would show that the charge upon which the complaint is predicated was filed many years ago and that the Board has without reason unreasonably delayed the disposition of the charge and has failed and refused to investigate the charge or advise Respondent of the specific facts and circumstances upon which the charge is predicated. Respondent says that it has no knowledge of any acts or circumstances which may in fact be the basis of the complaint and that the generalities involved in the language of the pleader require Respondent to endeavor to account for all of its relations with the union over a period of two years and nine months, a task rendered impossible.

Respondent would show that the language in numbered Paragraph 7 of the complaint, to-wit, "did refuse and con-

tinues to refuse to bargain collectively with the union", is the only notice given Respondent of any conduct of Respondent and that such notice is inadequate and amounts to a nullity, and, therefore, is violative of the National Labor Relations Act, and Respondent is unable to prepare its responsive pleading or to prepare for trial.

WHEREFORE, Respondent prays an order requiring the National Labor Relations Board as complainant to make more particular and to specify the acts upon which the complaint is predicated.

MOTION FOR AN ORDER PERMITTING THE INSPECTION AND COPYING OF EVIDENCE NOT PRIVILEGED

Respondent in accordance with the provisions of Rule 34 of the rules of civil procedure of the United States District Courts moves the National Labor Relations Board for an order permitting Respondent to inspect the following documents containing relevant and material evidence to the transactions involved in the complaint and not privileged, and in the possession of the Regional Director of the
33 National Labor Relations Board for the Sixteenth Region, one Dr. Edwin A. Elliott, at Forth Worth, Texas:

(a) All statements of witnesses intended to be produced and offered at the trial of the aforementioned complaint;

(b) Reports of investigators of the National Labor Relations Board containing factual information relating to the transactions involved in the aforementioned complaint.

WHEREFORE, Respondent prays for an appropriate order specifying the time, place and manner of making the inspection requested above.

1.

Respondent admits all of the allegations in Paragraph 1 of the complaint.

2.

Respondent admits all of the allegations in Paragraph 2 of the complaint.

3.

Respondent admits the allegations in Paragraph 4 of the complaint.

4.

Respondent denies the allegations in Paragraph 5 of the complaint and in particular the allegations thereof to the

effect that said union "is now the exclusive representative of all of the employees in said unit" for the reason that such employees, exercising the right created in them under the provisions of law, have withdrawn from membership in the union and do not now desire that said union act as their bargaining agent. The exact number of employees who have withdrawn from membership in said union is unknown to Respondent, but well known to said union.

5.

Respondent denies the allegations of Paragraphs
34 6, 7, 8 and 9 of the complaint, and all of such allegations, and says that it did bargain in good faith with the union for several years and engaged in numerous bargaining sessions and that the bargaining resulted in an impasse. That thereafter the employees of Respondent withdrew their affiliation with the union.

Respectfully submitted,

MEXIA TEXTILE MILLS
By JOHN M. SCOTT
For SAMUELS, BROWN, HERMAN & SCOTT
1210 Electric Building
Forth Worth, Texas
Attorneys for Respondent

Duly sworn to by J. G. Coman.
Jurat omitted in printing. (All in italics.)

39 Before the National Labor Relations Board

(Title Omitted)

Stipulation

JURISDICTION

IT IS HEREBY CERTIFIED by and between Mexia Textile Mills, Inc. and V. Lee McMahon, Attorney for the National Labor Relations Board, hereinafter called the Board, that the matters hereinafter set forth are facts and that the entire Stipulations may be introduced into evidence at the hearing in this proceeding and that the facts set forth herein may be considered by the Trial Examiner and by the Board as evidence and given the same weight as if adduced through sworn testimony by witnesses at the hearing.

Mexia Textile Mills, Inc., hereinafter called the respondent, is a Texas corporation with its office and principal place of business in the City of Mexia, County of Limestone,

State of Texas, where it is engaged in the operation of a cotton textile mill. Respondent manufactures principally cotton duck and related products. During the years 1945 and 1946 respondent purchased and received annually at its Mexia mill raw materials valued in excess of $500,000.00, of which approximately 50 percent was shipped to said mill from points outside the State of Texas. During the same years respondent produced, sold and delivered annually from its Mexia mill products valued in excess of $500,000.00, of which in excess of 50 percent was shipped from its Mexia mill to points outside the State of Texas. The volume of respondent's business during the first six months of 1947 has been substantially the same as for the preceding 2 years.

Respondent admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

Majority Representation in An Appropriate Bargaining Unit

On October 25, 1944, following a hearing upon due notice, the Board issued its Decision and Direction of Election, in which Decision the Board found that all production and maintenance employees of respondent employed at its Mexia plant, exclusive of clerical employees, the carpenter in the spinning department, the regular gate watchmen, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employees, with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9, subdivision (b), of the Act.

The nature of respondent's operations have not changed materially since September 22, 1944, the date of the aforesaid hearing, and the facts set forth by the Board in its Decision of October 25, 1944, and upon which it based its finding with respect to the appropriate bargaining unit have remained and still are substantially the same.

On November 8, 1944, an election was conducted by the Board among the employees in the unit which the Board had found to be appropriate, the results of which revealed that of the approximately 186 eligible voters, 164 cast valid votes, of which 146 were cast for the Union and 18 against. Thereafter, on November 18, 1944, the Board certified that Textile Workers Union of America, C.I.O., was the ma-

jority representative of the employees in the unit which the Board had found to be appropriate for the purposes of collective bargaining. No election has been held since
41 the aforesaid certification, no claim to representation has been made by any other labor organization, and the Board has done nothing to alter its original certification.

MEXIA COTTON MILLS, INC.
BY JOHN M. SCOTT

NATIONAL LABOR RELATIONS BOARD
By V. LEE MCMAHON
Attorney

Dated this 19th day of Aug., 1947.

43 Before the National Labor Relations Board
Trial Examining Division
Washington, D. C.

(Title Omitted)

Intermediate Report

STATEMENT OF THE CASE

Upon an amended charge duly filed by the Textile Workers Union of America, CIO, herein called the Union, the National Labor Relations Board, herein called the Board by the Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated June 27, 1947, against Mexia Textile Mills, Inc.,[1] Mexia, Texas, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, together with notice of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that the respondent from on or about November 22, 1944, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, although a majority of said employees had designated the Union as their representative for such purposes. The respondent's

[1] At the hearing the complaint was amended to provide for the correct corporate title as above.

answer, duly filed, admitted its corporate structure and business activities and the appropriateness of the unit. It denied that the Union "is now the exclusive representative of all the employees in said unit" for the reason that such employees had withdrawn from membersihp in the Union and do not now desire that the said Union act as their bargaining agent, and further denied that it had engaged in any unfair labor practices. In addition, the answer alleged, *inter alia*, that the respondent bargained in good faith with the Union for several years and that the bargaining resulted in an impasse.

Pursuant to notice, a hearing was held at Mexia, Texas, on August 19 and 20, 1947, before the undersigned, the Trial Examiner designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by its Regional Director; all participated in the hearing. Full opportunity to be heard, to
44 examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. At the outset of the hearing, counsel for the respondent stated that he was appearing "specially" for the purpose of presenting certain preliminary motions. He then moved for a more definite statement and in accordance with the provisions of Rule 34 of the Rules of Civil Procedure for the District Courts of the United States, for an order permitting the inspection and copying of evidence not privileged.[2] Both motions were denied. Thereupon the respondent's counsel took no further part in the hearing and withdrew, taking with him Mr. J. G. Coman, general manager of the respondent's plant, who had been subpoenaed as a Board witness.[3] At the conclusion of the hearing counsel for the Board moved to conform the pleadings to the proof as to formal matters and this motion was

[2] Counsel for the respondent stated that it was his request to inspect (a) all statements of witnesses intended to be produced and offered at the hearing, (b) reports of investigators of the Board containing factual information relating to the transactions set forth in the complaint.

[3] Although as heretofore noted, counsel for the respondent stated that he was appearing "specially" for the purpose of presenting preliminary motions, his answer, and a stipulation entered into by him with counsel for the Board, admitted the jurisdiction of the Board in this proceeding. A special appearance is made for the sole purpose of questioning a court's jurisdiction. A designation of an appearance as special is not determinative of the character of the appearance. If the appearing party asked relief or discloses a purpose which goes beyond questioning the jurisdiction of the court, the appearance is general, no matter what it may be called or designated.

granted without objection. Counsel for the Board presented oral argument which was included in the transcript of the hearing. The parties did not avail themselves of an opportunity to file briefs or proposed findings of fact and conclusions of law for consideration by the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the respondent

The respondent, a Texas corporation has its principal office and place of business in Mexia, Texas, where it is engaged in the operation of a cotton textile mill. The respondent manufactures principally cotton duck and related products. During the years 1945 and 1946, the respondent purchased and received annually at its Mexia mill, raw materials valued in excess of $500,000, of which approximately 50 percent was shipped to its mill from points outside the State of Texas. During the same years the respondent produced, sold and delivered annually from its Mexia mill, products valued in excess of $500,000, of which more than 50 percent was shipped to points outside the State of Texas. The volume of respondent's business during the first 6 months of 1947 has been substantially the same as for the preceding 2 years.

The respondent admits and the undersigned finds that it is engaged in commerce within the meaning of the Act.[4]

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II. The organization involved

Textile Workers Union of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III. The unfair labor practices

A. The appropriate unit

The Board in its Decision and Direction of Election issued October 25, 1944[5] found an appropriate unit as follows: "All production and maintenance employees of the Company, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spin-

[4] These findings are based upon a stipulation of the parties entered into at the hearing herein.

[5] 58 N. L. R. B. 1327

ning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action * * * " No issue was raised at the hearing respecting this determination, and the undersigned finds that said employees constitute a unit appropriate for the purposes of collective bargaining and that such unit insures to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

B. The representation by the Union of a majority in the appropriate unit

At a secret ballot election conducted by the Board on November 8, 1944, pursuant to the Decision and Direction of Election mentioned above, the Union was designated by a majority of the employees in the appropriate unit as their representative for the purposes of collective bargaining. Accordingly, on November 18, 1944, the Board certified the Union as the exclusive representative of the respondent's employees in the appropriate unit. The respondent contends in its answer, however, that a number of employees withdrew from membership in the Union.[6] As heretofore noted, the respondent withdrew from the hearing at the outset and did not introduce any evidence on this issue. The Union introduced in evidence 126 signed membership cards dated during the month of October 1946. There was also evidence introduced that there was no substantial change in the number of employees in the appropriate unit since the Board's Decision and Direction of Election. The undersigned finds no merit in this contention.

Moreover, at no time during protracted negotiations between the parties, hereinafter more fully set forth, did the respondent raise any question as to the representative status of the Union, and in view of the long-standing policy of the Board to treat a certification of a bargaining representative in such circumstances as valid until rescinded or superseded, the undersigned finds that on November 18, 1944 and at all times thereafter, the Union was and now is the duly designated representative of a majority of the employees in the appropriate unit and that pursuant to

[6] The respondent did not know the exact number of employees who withdrew their membership.

Section 9 (a) of the Act, the Union was and now is the exclusive representative of the employees in the said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

46 C. THE REFUSAL TO BARGAIN

1. The facts

On or about November 25, 1944, a week after the Union's certification, Herschiel Moore, its International Representative, met at the mill with Manning, the respondent's mill superintendent, Coman, and a Union committee. A general discussion ensued regarding the provisions of a proposed contract submitted by the Union. At the conclusion of the meeting, Coman told the Union representatives present that he could not give them a decision on any of the proposals and arranged for a further meeting at which W. W. Mason, the respondent's local attorney, would be present.

About 2 weeks later, a second meeting was held in the respondent's office, attended by Mason and the group noted above. Mason advised the Union representatives that there were several matters in the proposed contract which the respondent did not approve of, but that the proposed contract would be studied further and given consideration. Mason, at the same time asked that Paul Schuler, Regional Director of the Union, be present at their next meeting.

In December 1944, Schuler spoke to John Scott, counsel for the respondent, requesting that the parties continue with their contract negotiations. Scott suggested that since there were then pending negotiations between the Union and two other cotton mills,[7] which Scott represented, it would be advisable to postpone negotiations between the Union and respondent with the thought that whatever pattern on wages and other contract provisions was arrived at with the other mills, would be followed by the respondent. The Union accepted Scott's suggestion.

During the second week in December 1944, a conference was held in Scott's office to negotiate wage increases for the Hillsboro and Itasca Mills, attended by the respective representatives of the said mills, Scott, and Schuler and Moore representing the Union. After the parties concluded their discussion on wages and the Hillsboro and Itasca representatives left the meeting, Schuler and Moore talked with Scott about the respondent's delay in meeting

[7] The mills were the Hillsboro and Itasca Cotton Mills.

with the Union to negotiate a contract. Scott told Schuler and Moore that the Union would not be successful in obtaining bargaining contracts from Hillsboro, Itasca, or the respondent because the management officials of the respective mills lacked an understanding of the problems of labor relations and because of their violent antagonism toward the CIO and its international unions. Scott further told them that if they had consulted him before attempting any organizational drives at these plants, he would have advised them of the futility of their endeavors.

In January 1945, the Union obtained new wage agreements from the Hillsboro and Itasca Mills. Despite Scott's previous assurance to the Union that the respondent would follow a similar pattern both as to wages and contract negotiations, the respondent repudiated Scott's commitment and refused to go along. Thereupon, Schuler requested that negotiations commence immediately between the Union and the respondent as an individual plant.

Early in February 1945, Schuler, Moore, and a committee of employees met with Coman and Manning and continued their discussions of the proposed contract submitted by the Union. Coman stated that the signing of a contract was "a weighty problem" for him to decide and reserved his rights to withdraw his agreement on any provisions if he found that subsequent provisions under discussion were not satisfactory to him. The parties did not reach an
47 understanding on the contract at this meeting, but agreed to hold a further conference at which Mason, the respondent's local attorney, would be present to protect the respondent's legal rights.

Late in February 1945, the parties met with Attorney Mason in the latter's office. Copies of the Union's proposed contract were distributed to all persons present. A review and discussion of each provision followed with the result that agreement was reached on certain of the provisions, others were modified, and still others were withdrawn by the Union because they were not acceptable to the respondent. At the conclusion of the meeting Mason said, "Now, I want you boys to put this thing [contract] into words. We have agreed on principle and most of the wording. I want you to get it together and then send copies to me so that I can submit it to John Scott because you know, he is the big gun in this affair, and we can't move without him." Schuler challenged Mason's statement that final approval of the contract rested with Scott and stated that it was his understanding that he was dealing with Coman. When Schuler

asked which of the respondent's officials had final authority to negotiate the contract with the Union, Mason smiled and said, "Maybe I don't know either."

Thereafter, the Union revised its proposed contract in conformance with the agreements previously reached, and on or about March 13, 1945 sent copies of the revised contract to Mason and the respondent. Mason, in acknowledging receipt, advised Schuler that he was forwarding a copy to Scott for his approval. Failing to hear from either Coman or Mason on the revised contract, Schuler spoke to Scott on the telephone and was told that he (Scott) had rejected the contract. Schuler asked if there were any specific provisions which did not meet with Scott's approval and was told categorically that the entire contract was rejected. Schuler asked why the Union was being given the "run-around," to which Scott replied "I am not giving you a "run-around. You are just learning about Texas labor relations." Schuler, at this time contacted the United States Department of Labor requesting the assistance of the Conciliation Service in the Union's further negotiations with the respondent.

Late in March 1945, Schuler talked with Scott in an effort to arrange a negotiating conference between the Union representatives which would include Emil Rieve, its international president,* and the respondent. Scott told Schuler that in his opinion nothing would be accomplished because the respondent was not ready to sign a contract, but that if the Union wanted such a meeting, he would arrange it for whatever it might be worth.

The following day Schuler, Moore, Rieve and a United States Conciliation Commissioner went to the respondent's office to meet with Coman, in accordance with the arrangements made by Scott. They were told that Coman had left the plant, and was not expected to return that afternoon, and that no conference would be held.** The Conciliation Commissioner advised the Union representative that he would recommend that his department certify the matter to the National War Labor Board.

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* Rieve was in Dallas, Texas, on a tour of inspection and indicated a desire to meet with the respondent to see if he could assist the parties in arriving at a contract.

** Upon their arrival in Mexia and before going out to the respondent's plant, Schuler, Moore, and Rieve stopped for lunch. As they were leaving the restaurant they saw Coman seated at a table, passed the time of day and said they would see him later.

On June 20, 1945, a Tri-partite Panel of the Eighth Regional War Labor Board unanimously recommended a 50 cent minimum wage for all of the respondent's production and maintenance employees as well as an increase
48 of 5 cents an hour across the board, retroactive to April 19, 1945, with the understanding that the matter of wages should be reopened in August 1945, and with the further understanding "that the Directive Orders covering 28 other points at issue as divided in the Itasca and Hillsboro plants shall prevail at the respondent's plant."

On August 1, 1945, Scott in a letter to Schuler requested that the Union draft a wage stipulation in accordance with the Panel's recommendation, which he would submit to the respondent for their approval.[10] Scott indicated that he did not know whether the respondent would accept this recommendation, but assumed that they would. Schuler mailed the wage stipulation to Scott on or about August 13, 1945.

Not having received the wage stipulation from the Union, Scott in a letter to Schuler dated August 17, 1945, asked the Union for its position in the matter. Scott also set forth that the respondent was willing to put into effect the Panel's recommendations and that he had the Form 10's in his office to carry this out.

Despite Scott's August 17, letter, the respondent did not take any steps to put into effect the wage increases. Late in September 1945, Schuler and Moore met with Coman and Manning to further discuss a bargaining contract between the Union and the respondent. Coman opened the discussion by stating that the respondent was "pretty near broke" and could not afford the 50 cent minimum and 5 cent across the board increase in wages retroactive to April 19, but that it would grant the increase if it did not have to pay the same retroactively. When Coman was confronted with Scott's statement of August 17, he stated, "Well, I am the plant manager and I say that we can't afford to pay." Schuler reminded Coman that when the Union met with Coman and Mason to discuss the terms of a contract, it was told that Scott's approval had to be obtained. On the issue of the increase in wages Scott told the Union that Coman's approval was necessary. Now for the first time in

[10] Although the respondent had not granted wage increases to its employees in accordance with the Panel's recommendations, Schuler, on July 27, 1945, addressed a letter to the respondent making new wage increase demands to be put into effect on August 1, 1945.

the course of the negotiations which commenced in November 1944, Coman interjected the respondent's Board of Directors as the final authority in the matters of increases in wages and a bargaining contract. Schuler asked Coman why he had been referred to Scott previously for approval of the contract and why he had not been told that the Board of Directors had final authority. Coman answered, "I am afraid the Board of Directors would not want to talk to you because they think you are a Bolshevick." After some further discussion the Union agreed to put Coman's proposals on the wage increase into writing, have it signed by Schuler, Moore, Coman and Manning, and posted on the plant bulletin board, and thereafter, at a Union meeting, a vote of the membership would be taken to determine its acceptance or rejection. Coman agreed to arrange a future meeting for Schuler with the Board of Directors.[11]

On September 25, 1945, the Eighth Regional War Labor Board issued its directive order in the dispute between the respondent and the Union. The directive order set forth among other things that the contract between the parties shall contain clauses for maintenance of membership, check-off, a bulletin board on the respondent's premises for the exclusive use of the Union, and paid vacations. It did not pass upon the wage issue, but referred the same back to the parties for further negotiation, with instructions to report the result of such negotiations to the Eighth Regional War Labor Board on or before 30 days from the date of the issuance of the directive order.

49 Practically simultaneously with the receipt of the directive order, the Union filed a labor dispute notice under the War Labor Disputes Act with the Board. The Board notified the respondent of the Union's action and scheduled an election to be held among the respondent's employees on October 14.

On September 26, 1945, Coman sent Schuler the following telegram:

> In view of notice received this morning from National Labor Relations Board that dispute notice has been filed and election scheduled for Oct. 14, our directors are of opinion that meeting set for Friday Sept. 28 is unnecessary and is thereby cancelled.

Upon receipt of the telegram Schuler spoke to Scott, asking him to check the National Labor Relations Act in

[11] Coman subsequently notified Schuler by letter that the Board of Directors would meet with him on September 28, in the office of R. L. Dillard, in Mexia, Texas.

order to prove to himself that neither a request that a strike vote be taken nor even engaging in a strike was sufficient cause to halt negotiations between a company and a union, to which Scott replied, "You have not seen me operate yet." Schuler, was never thereafter afforded the opportunity to meet with the respondent's Board of Directors.

The strike vote taken on October 14, 1945, resulted overwhelmingly in a decision to strike.[12] The production and maintenance employees walked out on strike on or about October 17 or 18, 1945. The strike was in progress for approximately 5 weeks, when the United States Conciliation Service requested the employees to return to their jobs so that they could attempt to work out a contract between the respondent and the Union. The employees voted to call off the strike and returned to work on or about November 19, 1945.[13]

On December 9, 1945, Moore wrote to the respondent asking for a meeting before December 19, 1945, to resume contract negotiations. Coman, by letter dated December 11, 1945, stated that the respondent had just received the War Labor Board's recommendations and had not yet reviewed them with Scott.[14] Furthermore, the respondent felt that in order to be able to properly engaged in negotiations, it had to be prepared to express itself definitely on the War Labor Board's recommendations and it therefore wanted the opportunity to go over the recommendations in detail at a Board of Directors meeting, with Scott present. The letter closed with the statement that the respondent would write to the Union about December 19, after it had completed the above noted arrangements, suggesting a date for a meeting.

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[12] Of 144 eligible voters, 133 cast ballots with 127 voting "Yes," 4 "No," and 2 ballots were void.

[13] The dates of the strike are based upon the testimony of Schuler, who testified that the employees walked out on the Wednesday or Thursday after the strike vote and returned to work 5 weeks from the following Monday.

[14] The record does not show that the War Labor Board submitted a Directive Order to the respondent just prior to December 11, 1945. It is not clear therefore, which recommendations, Coman was referring to in his December 11, letter. It is noted however, that subsequent to the issuance of the Eighth Regional War Labor Board Directive Order on September 25, 1945, heretofore referred to, the respondent filed a petition for review. On December 15, 1945, the National War Labor Board issued its Directive Order in which it denied the petition for review and affirmed and adopted the Directive Order of September 25, 1945, as its order.

On December 15, 1945, the respondent posted a notice in the plant stating that effective December 31, 1945, the wages for all hourly paid employees, except learners, were to be increased 5 cents per hour, and that piece work rates would be adjusted accordingly; that the work week would be 45 hours, consisting of five 9 hour days and no Saturday work. On December 21, 1945, another notice was posted in the plant by the respondent, notifying the employees that the plant would be shut down on December 24 and 25; that the employees would be paid straight time for December 24, and time and one-half for December 25, and that work would resume on December 26; that wages for all employees, except beginners were to be raised 5 cents per hour beginning January 1, 1946; that the plant would cease operating on Saturdays; and wishing all employees a Merry Christmas and a Happy New Year. The actions of increasing wages and decreasing the number of hours in the work week were taken without any prior conference with the Union, or any notice to it that such actions would be taken, and at a time when the Union was still endeavoring to resume contract negotiations and adjust its wage controversy with the respondent.

On or about January 18, 1946, a Union negotiating committee consisting of 5 employees and Moore met with Coman and Scott to again talk about a proposed contract.[15] The respondent refused to agree to any form of union security, and after about 45 minutes of further general discussion on the Union's proposals, the meeting broke up without agreement being reached on any proposal.

By letter dated March 14, 1946, Coman advised the Union that the O. P. A. had just issued an order permitting wage increases without approval, if put into effect before March 15, 1946. The respondent therefore, in accordance with its consistent policy of keeping its wages as high as the ceiling price situation permitted, was going to put into effect "on or before March 15," a general wage adjustment.[16] The letter also set forth that the short period of time allowed the respondent prevented it from giving the Union advance notice of this wage increase.

On March 18, 1946, the respondent filed a Form 10 with the Department of Labor, applying for retroactive approval of a wage adjustment made on March 11, 1946. The re-

[15] This meeting came about as the result of the exchange of letters in December 1945, between Coman and Moore.

[16] As hereinafter found, the respondent had put its wage increase into effect on March 11, 1946.

spondent noted that it had twice previously granted wage increases as follows: on September 2, 1945, to bring its wage rates in line with its competitors;[17] and on December 31, 1945, to enable it to secure high band prices for its products.

On April 3, 1946, Coman requested Moore to sign the Form 10 on behalf of the Union.[18] Moore refused to join in the filing of the Form 10, and returned the application unsigned to Coman on April 4, 1946, protesting that the wage increase placed into effect by the respondent had not been negotiated with the Union and it did not know if the increase was satisfactory to the employees.

51 On July 31, 1946, the Union wrote to the respondent requesting a date for a meeting to negotiate wage increase demands which had previously been submitted to the respondent by Emil Rieve, General President of the Union. The respondent replied to Schuler on August 10, 1946, stating that it was unable to set a date for wage negotiations "until we have clarified the legal situation arising from your protest of our last wage increase."

On August 15, 1946, the Union again wrote to the respondent pointing out that even though it was the certified bargaining representative of the respondent's employees, it had been disregarded when the respondent instituted its last wage increase, but despite that, it suggested a conference to clear up that matter, to negotiate further wage increases, and to enable the parties to get on a reasonable and friendly bargaining basis.[19]

On October 22, 1946, Coman addressed the following letter to Lewis Moore, Attorney for the Union:

> Our president Mr. R. L. Dillard, informed writer today that you had called on him to discuss a contract between this mill and the Textile Workers Union. Also, that he had referred you to writer for such discussion and asked that we inform you if such a meeting could be held Thursday morning, October 24.

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[17] This action was taken without any prior conference with the Union and at a time when the Union was endeavoring to get the respondent to put into effect the Regional War Labor Board's Panel recommendation on wage increases, referred to hereinabove, which the respondent contended it could not afford because it was "pretty near broke."

[18] The Form 10 required in addition to the respondent's signature, the signature of an official of the certified bargaining representative, as a condition precedent to the processing of the application.

[19] The record is silent as to whether the Union ever received a reply to this letter.

> Our mill is represented by Mr. John M. Scott of Samuels, Brown, Herman, & Scott, Fair Building, Fort Worth, Texas and we ask that you arrange with him for such a meeting * * *

On October 26, 1946, Lewis Moore wrote to Scott stating that it was his understanding that only the respondent's Board of Directors had authority to agree upon the terms of a collective bargaining contract and requesting Scott to arrange a meeting between Lewis Moore and the Board of Directors to discuss the terms of a contract. Scott replied on November 13, 1946, stating that he had not yet been able to set a definite date for the meeting, but hoped to notify Lewis Moore of a meeting date within a few days. Neither the Union nor Lewis Moore were ever notified by Scott of any meeting that he had arranged with the respondent's Board of Directors.

During the month of October 1946, a Union grievance committee consisting of five employees endeavored on two occasions to meet with Coman after working hours to discuss the grievances of several employees. Coman flatly refused to meet with any Union committee, but indicated that he would talk with any individual about his grievance.

On or about December 11, 1946, E. A. Garner, an employee in the respondent's spinning room was discharged. The Union grievance committee called on Coman in an attempt to bargain about Garner's reinstatement. Not finding Coman in his office, the committee asked Superintendent Tally if he would talk with them. Tally refused, but agreed to meet with Garner. Upon the continued refusal of the respondent to meet with the committee or to adjust Garner's grievance, the employees of the spinning room, with several exceptions, went out on strike in the afternoon of December 12. Schuler arrived in Mexia, Texas, on December 13, and after meeting with the striking employees to ascertain the facts regarding the strike, made two attempts to confer with Coman. Coman refused to
52 talk with Schuler, stating that he had talked to the employees, and what he said to them was final.[20] On

[20] Howard Hinchliffe, president of the local union, testified that when the spinning room employees did not return to work after their lunch hour on December 12, Coman came to the plant gate and told the striking employees to return; that the gate would be locked and none of the striking employees would be taken back except as new employees. The gate was then locked and the striking employees were refused permission to enter the plant even though they wanted to return to work on December 13.

December 15, Dillard, a member of the respondent's Board of Directors, told a committee of employees that Coman should have conferred with them when they asked to discuss Garner's discharge and that the employees should not have walked out on strike. Dillard then told the committee that the striking employees could return to work on December 16.

There were no further bargaining conferences or any correspondence between the respondent and the Union.

2. Conclusions

From the evidence, it is apparent that, although the respondent conferred with the Union on possible contract provisions, it did not bargain in good faith and had no intention of doing so. Thus, practically at the inception of bargaining, Scott made clear to the Union that it would not succeed in obtaining a bargaining contract, because the respondent's officials lacked an understanding of the problems of labor relations and because they were violently antagonistic toward the CIO and its international unions. Despite Scott's unequivocal statement, the Union, in its continued efforts to obtain a bargaining contract changed its proposed contract in accordance with the suggested modifications of the respondent and again the Union was rebuffed. This time, March 1945, 5 months after the respondent and the Union first met, and during which period the parties had at least six conferences, Scott told the Union that the respondent was not ready to sign a contract. In the undersigned's opinion, Scott's remarks to the Union when they first met show clearly that when the respondent entered into discussion it did not do so with an open and fair mind and a sincere purpose to find a basis of agreement. Its subsequent conduct, in categorically rejecting without explanation the written contract, the terms of which had been mutually agreed upon, and its further statement that it was not ready to sign a contract demonstrate an unmistakeable effort to escape genuine collective bargaining. Such conduct on the part of an employer is indicative of bad faith.[21]

An equally persuasive factor in determining whether the respondent bargained in good faith is its conduct in not revealing to the Union, the fact that the Board of Directors was the final authority in matters of increases in wages and a bargaining contract, until September 1945, 11 months

[21] *Matter of Tomlinson of High Point, Inc.*, 74 N. L. R. B. No. 127

after negotiations had started. During this time the Union had corresponded and conferred on different occasions with Coman, Scott, and Mason. In the course of attempting to arrange a meeting with the Board of Directors, Schuler was told by Coman, that he did not think the Board of Directors would talk to him because they thought he was a Bolshevik. Coman, however, was persuaded to arrange such a meeting, which was set for September 28, 1945. The Board of Directors was advised on September 25, 1945, that the Union had filed a labor dispute notice under the War Labor Disputes Act and forthwith cancelled its scheduled meeting. The Union was never thereafter afforded the opportunity to meet with them. The filing of the labor dispute notice by the Union did not excuse the Board of Directors from refusing to meet and bar-
53 gain with the Union, for it has consistently been held that neither a contract violation, illegality in the inception of a strike, nor illegal acts in its conduct may serve to impair or suspend the employer's obligation to bargain with the statutory representative.[22] It had long been recognized by Board and Court decisions that if the objective of the Act to substitute collective bargaining for industrial warfare is to be achieved, it is important that the bargaining process be available prior to, during the course of, or subsequent to a strike.

Finally, the action of the respondent in unilaterally changing the wage rates and granting a Christmas vacation with pay constitute a violation of its statutory duty to bargain collectively.[23] That failure to consult with the Union becomes particularly indicative of bad faith when one considers that the wage changes were made during the period when the Union was attempting to negotiate an increase in the wage scale with the respondent.

In these circumstances, and upon the entire record in the case, the undersigned finds that on November 25, 1944,

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[22] See, *e. g.*, *Matter of Greater New York Broadcasting Company*, 48 N. L. R. B. 718, enf'd *N. L. R. B. v. Greater New York Broadcasting Corporation*, 147 F. 2d 337 (C. C. A. 2); *Matter of Reed & Prince Mfg. Co.*, 12 N. L. R. B. 944, enf'd *N. L. R. B. v. Reed & Prince*, 118 F. 2d 874 (C. C. A. 1); *N. L. R. B. v. Highland Shoe*, 119 F. 2d 218 (C. C. A. 1). See *in re* effect on employees' rights of a failure to file strike notices pursuant to War Labor Disputes Act, *Matter of Republic Steel (98" Strip Mill)*, 62 N. L. R. B. 1008.

[23] *May Department Stores Company, etc. v. N. L. R. B.*, 326 U. S. 376; *Medo Photo Supply Corporation v. N. L. R. B.*, 321 U. S. 678. See also *Matter of Brown Radio Service and Laboratory*, 70 N. L. R. B. 476.

and thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and that the respondent has thereby interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

V. The remedy.

Having found that the respondent has engaged in certain unfair labor practices, the undersigned will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. The undersigned has found that the Union represented a majority of the employees in the appropriate unit and that the respondent refused to bargain collectively with it. Accordingly, the undersigned will recommend that the respondent, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.

Upon the above findings of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Textile Workers Union of America, affiliated with the Congress of Industrial Organizations is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production and maintenance ~~employees~~ of the respondent, ~~excluding~~ clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the
54 spinning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, at all times material herein constituted and now constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Textile Workers Union of America was, on November 18, 1944, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on November 25, 1944, and at all times thereafter to bargain collectively with Textile Workers

Union of America as exclusive representative of the employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Mexia Textile Mills, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, CIO, as the exclusive representative of all production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Engaging in any other acts in any manner interfering with the efforts of Textile Workers Union of America, CIO, to negotiate for or represent, as their exclusive bargaining agent, the employees in the aforesaid bargaining unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with Textile Workers Union of America, CIO, as the exclusive bargaining representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

55 (b) Post at its plant copies of the notice attached to the Intermediate Report herein marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by other material;

(c) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the receipt of the Intermediate Report the respondent shall notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

SIDNEY LINDER
Trial Examiner

December 18, 1947.

56

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT engage in any acts in any manner interfering with the efforts of TEXTILE WORKERS UNION OF AMERICA, CIO, to negotiate for or represent the employees in the bargaining unit described below.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, or other conditions of employment and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

MEXIA TEXTILE MILLS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

57 NLRB—1405
(12/9/47)

Before the National Labor Relations Board

(Title Omitted)

Order Transferring Case to the National Labor Relations Board

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

It Is Hereby Ordered, pursuant to Section 203.45 of National Labor Relations Board Rules and Regulations, Series 5, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., December 18, 1947.

By direction of the Board:

Frank M. Kleiler
Executive Secretary

Note: Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint.

Your attention is specifically directed to the concluding paragraph of the Intermediate Report in respect to your right to file exceptions, briefs, and to request oral argument. Please note that exceptions and brief must be filed as separate documents.

59 United States of America

Before the National Labor Relations Board

(Title Omitted)

Order

On December 18, 1947, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in certain unfair labor practices and recommending that it take specific action to remedy such unfair labor practices.

Thus, Senator Taft correlated the amendment with Section 10 (e) under which courts had refused to review any issue as to which an exception had not been filed by a respondent.

Furthermore, an analysis of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Secs. 1001 *et seq.*) shows that the objection set forth in the House Minority Report to the effect that the amendment suspends the doctrine of exhaustion of administrative remedies, is manifestly incorrect. On the contrary, Section 8 of the Administrative Procedure Act, consistent with Section 10 (e) of the National Labor Relations Act, as amended provides that an initial decision

> of a subordinate officer who conducted the hearing
> 84 shall become the decision of the agency, in the absence
> of an appeal to the agency within the time provided by rule."

Although under Section 203.45 of the rules promulgated by the National Labor Relations Board (12 F. R. 5656, 5661), the decision of the trial examiner is not an "initial decision" but is, rather, an intermediate report and recommended order, it is obvious that Congress recognized the feasibility of making decisions by subordinate officers the decision of the agency where alleged errors therein are not called to the attention of the agency.

The Attorney General in discussing Section 8 (a) of the Administrative Procedure Act recognized the applicability of this provision to a recommended decision. Thus, in Attorney General's Manual on the Administrative Procedure Act (Federal Prison Industries, Inc., Press, 1947, the Attorney General says (at p. 84)):

> Where the hearing officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. However, it may provide that it will consider only such objections to its subordinates' decisions (recommended or initial) as

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* Section 8 of the Administrative Procedures Act provides: "In cases in which a hearing is required to be conducted in conformity with Section 7—

"(a) ACTION BY SUBORDINATES—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to Section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency * * *"

The case was transferred to the National Labor Relations Board on the same date. No Statement of Exceptions has been filed with the Board, and the time for such filing has expired.

Pursuant to Section 10 (c) of the National Labor Relations Act as amended and Section 203.48 of the National Labor Relations Board Rules and Regulations, Series 5, the Board hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as contained in the Intermediate Report and makes the following Order:

IT IS HEREBY ORDERED that respondent, Mexia Textile Mills, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, CIO, as the exclusive representative of all production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employee with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Engaging in any other acts in any manner interfering with the efforts of Textile Workers Union of America, CIO, to negotiate for or represent, as their exclusive bargaining agent, the employees in the aforesaid bargaining unit.

60 2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request bargain collectively with Textile Workers Union of America, CIO, as the exclusive bargaining representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its plant in Mexia, Texas, copies of the Notice attached hereto and marked Appendix A. Copies of said Notice, to be furnished by the Regional Director for the Sixteenth Region, shall be posted by the Respondent immediately upon their receipt, after being duly signed by a representative of the Respondent, and shall be maintain-

are presented to it as exceptions to such decisions. See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255 (1943); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387-88 (1946). It may also require that exceptions be precise and supported by specific citations to the record.

At this point in the Manual, the Attorney General in a footnote quotes from the Final Report of the Attorney General's Committee on Administrative Procedure (Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 52) as follows:

> The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal.

85 Although in Section 10 of the Administrative Procedure Act, Congress provided for judicial review of agency action, it expressly made the provisions of the section subject to statutes which limit the right and scope of review in specific instances.[7]

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[7] Section 10 of the Administrative Procedures Act provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

ed by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by other material;

(c) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., July 2, 1948.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

61 APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO AN ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT engage in any acts in any manner interfering with the efforts of TEXTILE WORKERS UNION OF AMERICA, CIO, to negotiate for or represent the employees in the bargaining unit described below.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, or other conditions of employment and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, excluding clerical employees, the carpenter in the spinning department, the regular gate watchman, the second hands in the weaving department, the head fixers in the carding department, and the head fixers in the spinning department, and all or any other supervisory employees with authority to hire, promote, discharge discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

MEXIA TEXTILE MILLS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

63 In the United States Court of Appeals
For the Fifth Circuit

(Title Omitted.)

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Acting Executive Secretary, duly authorized by Section 203.87 Rules and Regulations of the National Labor Relations Board—Series 5, as amended, (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings had before said Board, entitled, "In the Matters of Mexia Textile Mills, Inc. and Textile Workers Union of America, CIO," the same being known as Cases Nos. 16-R-994 and 16-C-1301, respectively, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

Case No. 16-R-994

(1) Copy of order designating Earl L. Saunders, Trial Examiner for the National Labor Relations Board, dated September 22, 1944.

(2) Stenographic transcript of testimony held before Trial Examiner Saunders, on September 22, 1944, together with all exhibits introduced in evidence.

(3) Copy of Decision and Direction of Election issued by the National Labor Relations Board on October 25, 1944, together with copy of affidavit of service thereof.

(4) Copy of tally of ballots, issued November 8, 1944.

(5) Copy of Certification of Representatives, issued by the National Labor Relations Board on November 18, 1944, together with copy of affidavit of service thereof.

64 Case No. 16-C-1301

(6) Copy of order designating Sidney Lindner Trial Examiner for the National Labor Relations Board, dated August 19, 1947.

(7) Stenographic transcript of testimony held before Trial Examiner Lindner on August 19, and 20, 1947, together with all exhibits introduced in evidence.

(8) Copy of Trial Examiner Lindner's Intermediate Report, dated December 18, 1947, copy of order transferring case to the Board, dated December 18, 1947, together with copy of affidavit of service thereof.

(9) Copy of Order, issued by the National Labor Relations Board on July 2, 1948, together with affidavit of service thereof.

IN TESTIMONY WHEREOF, the Acting Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 1st day of April 1949.

LOUIS R. BECKER
Louis R. Becker
(SEAL) *Acting Executive Secretary*
NATIONAL LABOR RELATIONS BOARD

In the United States Court of Appeals
For the Fifth Circuit

69 *Petition for Enforcement of an Order, Filed April 11, 1949*

74 In the United States Court of Apeals
For the Fifth Circuit

No. 12763

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MEXIA TEXTILES MILLS, INC.,
Respondent

Motion of the National Labor Relations Board for the Summary Entry of a Decree Upon the Transcript of the Record—Filed May 9, 1949

(File Endorsement Omitted)

Now comes the National Labor Relations Board, by its Assistant General Counsel, and upon the petition for en-

forcement and the transcript of the record filed herein moves the court for the entry of a decree enforcing the order of the Board. In support of this motion, the Board shows as follows:

1. The transcript of the record discloses:

(a) On June 27, 1947, the Board issued a complaint charging the respondents with certain violations of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Secs. 151, *et seq.)*, herein called the Act. Respondent filed an answer to the complaint. The answer contained, *inter alia*, a motion for a more definite statement and a motion for an order permitting the inspection and copying of certain evidence. The Acting Regional Director referred the first motion to the trial examiner for ruling, and overruled the second motion. Pursuant to notice, the matter proceeded to a hearing before a trial examiner. At the commencement of the hearing, respondent renewed its previous motions. The trial examiner denied both motions. Thereupon, respondent's counsel withdrew from the hearing and took no further part therein.

75 (b) Following the hearing, the trial examiner on December 18, 1947, issued an intermediate report. In said intermediate report, the trial examiner found: (a) that the respondent was engaged in commerce within the meaning of the Act; (b) that on November 18, 1944, following an election pursuant to the Board's direction of October 25, 1944 (58 N.L.R.B. 1327), the Board certified the Union as the exclusive representative of the respondent's employees in the appropriate unit therein described; and (c) that the respondent, in violation of Section 8 (5) of the Act, refused to bargain collectively with the Union as the exclusive representative of respondent's employees in the appropriate unit, and in violation of Section 8 (1) of the Act, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act. In the same intermediate report, the trial examiner, upon such findings, recommended that an order be issued against the respondent requiring it to cease and desist from the unfair labor practices found and directing it to bargain collectively with the Union, upon request, as the exclusive bargaining representative of all the employees in the appropriate unit, and to post notices.

(c) On December 18, 1947, the Board entered an order transferring the case to the Board. On the same day, respondent and its counsel were served with copies of said

order and with copies of the intermediate report containing the above findings and recommended order.

2. Section 10 (c) of the Act, as amended by the Labor Management Relations Act, 1947, (61. Stat. 136, 29 U.S.C., Supp. I, Secs. 141, *et seq.)* provides, in part, as follows:

> In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after the service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Rules 203.46 and 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, ef-
76 fective August 22, 1947 (12 F.R. 5656, 5662),[1] and in effect at the time the intermediate report herein was rendered, likewise provide that a party seeking to file exceptions to an intermediate report and recommended order must do so within twenty days from the date of the service of the order transferring the case to the Board. In the event that no statement of exceptions is filed within that period, the intermediate report and recommended decision shall become the order of the Board, and all objections and exceptions thereto shall be deemed waived for all purposes.

3. The transcript of the record discloses that the respondent failed to file a statement of exceptions to the intermediate report and recommended order. Pursuant to the aforesaid statutory provisions and rules, the Board, on July 2, 1948, adopted the findings, conclusions and recommended order of the trial examiner and issued the order sought to be enforced.

4. Section 10 (e) of the Amended Act, provides that no objection which has not been urged before the Board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

5. In view of the foregoing consideration, the Board respectfully submits that the respondent has waived all

[1] In 14 F. R. 78, these sections were redesignated as Sections 102.46 and 102.48, respectively. Said sections are set out in the Appendix, page 3, notes 2 and 3.

objections to the order, and there are no contestable issues before this Court.

6. This Court and the courts of appeals of every circuit in which the Board has made a motion of this character have upheld the right of the Board to summary enforcement of its order where the respondent, as here, has failed to file exceptions to the intermediate report and recommended order. *N. L. R. B.* v. *Cordele Manufacturing Company*, 172 F. 2d 225 (C. A. 5); *N. L. R. B.* v. *Davis*, 172 F. 2d 225 (C. A. 5); *N. L. R. B.* v. *Ullin Box and Lumber Co.* (C. A. 7, No. 9588); *N. L. R. B.* v. *Griffin-Goodner Grocery Co., Inc.* (C. A. 10, No. 3752); *N. L. R. B.* v. *Gunn* (C. A. 3, No. 9822); *N. L. R. B.* v. *Hill Transportation Co.* (C. A. 1, No. 4395); *N. L. R. B.* v. *Lancaster Foundry Corp.* (C. A. 6,
77 No. 10847). For the convenience of Court and counsel, the Board has attached hereto, as an Appendix, a copy of the brief submitted to the Court in support of its motion in the *Cordele Manufacturing Company* case, *supra*. The considerations set forth therein are urged in support of the present motion.

Wherefore, the Board prays that a decree be entered granting the relief prayed in its petition for enforcement.

/s/ A. Norman Somers

A. Norman Somers
Assistant General Counsel

Abraham H. Maller
Alan Kahn
Attorneys

National Labor Relations Board

Dated at Washington, D. C. this 6 day of May, 1949.

78 APPENDIX TO MOTION

In the United States Court of Appeals
For the Fifth Circuit

No. 12634

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

CORDELE MANUFACTURING COMPANY,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Brief for the National Labor Relations Board in Support of Its Motion for the Summary Entry of a Decree Upon the Transcript of the Record

STATEMENT OF FACTS

This case is before the Court upon the motion of the National Labor Relations Board for a summary judgment of enforcement of its order issued against respondents on October 8, 1948, following proceedings, hereinafter discussed, under Section 10 of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Secs. 151 *et seq.)*, herein called the Act, as amended by the Labor Management Relations Act of 1947, (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 151 *et seq.)*, herein called the Amended Act.

The respondent, Cordele Manufacturing Company is a Georgia corporation having its principal office and place of business at Cordele, Georgia, within this judicial district. The respondent has been at all times material herein engaged in the manufacture, sale and distribution of men's pants and related products. Prior to March 1948, the respondent purchased raw materials valued in excess of $25,000 annually, approximately 50 percent of which was purchased outside the State of Georgia and shipped from points outside the State of Georgia to the respondent's plant at Cordele, Georgia. During the same period the respondent's sales of finished products consisting chiefly of men's pants had a value in excess of $50,000 annually, approximately 66 percent of which was sold and shipped

from the respondent's plant at Cordele, Georgia, to points outside the State of Georgia. In the course of the Board proceedings the respondent conceded that it was engaged in interstate commerce.

On August 7, 1946, the Board issued its Decision and Certification of Representatives[1] certifying the Amalgamated Clothing Workers of America, C.I.O., hereinafter called the Union, as collective bargaining representative of employees of the respondent in a unit consisting of all production and maintenance employees, excluding executives, office and clerical employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action. This certification was based upon the results of a Board-conducted prehearing election held on May 24, 1946.

79 On December 19, 1947, Amalgamated Clothing Workers of America filed a third amended charge against the respondent in Case No. 10-C-1937; Evie Timmons filed a charge against the respondent on September 8, 1947, in Case No. 10-CA-7; and Veronia Gibbs filed a charge on September 8, 1947, in Case No. 10-CA-9. These cases were consolidated on March 30, 1948, by order of the Regional Director for the Tenth Region, and the Board issued its complaint on the same date, against the respondent, alleging that the respondent had engaged in and was engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act, and Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the amended Act.

Copies of the complaint and charges accompanied by notice of hearing thereon were duly served upon respondent, the Union and the individual charging parties. No formal answer was filed by the respondent. However, the respondent, on April 10, 1948, addressed a letter to the Regional Director for the Tenth Region in which it denied those allegations of the complaint charging it with violations of the Act and the amended Act. The Regional Director replied that it would be treated as an answer. The matter then proceeded to a hearing in which respondent was represented by Mr. H. O. Drake, an officer and stockholder of the respondent and former general manager in charge of its operations. Drake attended the first two ses-

[1] *Matter of Cordele Manufacturing Company*, 69 N. L. R. B. 1292.

sions of the three-day hearing, gave testimony on the second day thereof, and then withdrew. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. Opportunity was also afforded the parties to file briefs and proposed findings of fact and conclusions of law but none were submitted to the trial examiner.

Thereafter, on August 30, 1948, the trial examiner issued an intermediate report in which he found that the respondent was engaged in commerce within the meaning of the Act; that the respondent had discriminatorily discharged three employees and discriminatorily failed and refused to rehire a fourth employee, because of their active participation in union activities, all in violation of Section 8 (3) of the Act and Section 8 (a) (3) of the amended Act; that the respondent refused to bargain collectively with the Union, as the exclusive representative of its employees in the appropriate unit, in violation of Section 8 (5) of the Act and Section 8 (a) (5) of the amended Act; and that the respondent engaged in a campaign to impede and frustrate the Union organizational campaign among its employees and otherwise interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) of the Act and Section 8 (a) (1) of the amended Act.

The trial examiner recommended that an order be issued against the respondent requiring it to cease and desist from the unfair labor practices found; requiring the respondent to offer reinstatement, if operations are resumed, to two of the four employees against whom the respondent had discriminated and to make whole all the four employees for any loss of pay each may have suffered by reason of the respondent's discrimination against them; requiring the respondent, if operations are resumed, and upon request, to bargain collectively with the Union; and requiring the respondent to post appropriate notices.

The trial examiner in his intermediate report also called attention to Section 203.46 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947, which provides that any party may within twenty days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations file with the Board a statement in writing setting forth such exceptions to the intermediate report or to any other part of the record or proceedings as he relies upon, together with a brief in support thereof.

The trial examiner further specified that in the event no statement of exceptions if filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order contained in the intermediate report shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order and all objections and exceptions thereto shall be deemed waived for all purposes.

On August 31, 1948, copies of the intermediate report, recommended order and order transferring the case to the Board were sent by registered mail to the respondent, c/o Mr. H. O. Drake, Cordele, Georgia. After service thereof was refused, copies of said documents were served on September 18, 1948, by hand, upon I. R. Perlis, Vice-President of the respondent company, and a copy of the intermediate report was served by hand, on the same date, upon H. O. Drake, General Manager of the respondent company. The respondent has not filed any exceptions to the intermediate report and recommended order although the time prescribed by Section 10 (c) of the Act, as amended, and Section 203.46 of the Rules and Regulations of the Board (12 F.R. 5656, 5662), for the filing of exceptions has long since expired.[2]

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[2] The pertinent portion of Section 10(c) is set forth and fully discussed in the Argument post.

Rules and Regulations of the N. L. R. B., Series 5, effective August 22, 1947, (12 F. R. 5656, 5662):

"Sec. 203.46 *Exceptions or supporting briefs: time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral argument.*—

(a) Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board, pursuant to Section 203.45, any party may file with the Board in Washington, D. C., an original and six copies of a statement in writing setting forth such exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file an original and six copies of a brief in support of the intermediate report and recommended order, copies of which shall be immediately served on each of the other parties. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose.

"(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings."

Thereafter, on October 8, 1948, pursuant to the provisions of Section 10 (c) of the Act, as amended, and the provisions of Section 203.48 of the Rules and Regulations of the Board (12 F.R. 5656, 5662),[3] the Board adopted the findings, conclusions and recommendations of the trial examiner as contained in the intermediate report, and issued the order sought to be enforced in this proceeding. A copy of said order was served on November 8, 1948, by hand upon Mr. H. O. Drake, General Manager of the respondent company.

81 With its petition for enforcement and the certified transcript of the record, the Board has filed a motion for the summary entry of a decree to enforce its order. The motion is based upon the transcript of the record and is grounded upon the proposition that the respondent's failure to file exceptions to the intermediate report and recommended order, as required by the Act and the rules referred to above, constitutes a waiver of all objections to the order of the Board. Consequently, there are no contestable issues before this Court.

Argument

Under the National Labor Relations Act, as Amended, Where the Respondent Fails to File Exceptions to the Intermediate Report and Recommended Decision of the Trial Examiner, the Recommended Order Becomes the Order of the Board and is Enforceable by the Court Without Review.

In support of its motion for the summary entry of a decree, the Board urges that upon the record in this case a review of the Board's order is neither required nor permitted under the Act. Since the respondent did not file any exceptions to the intermediate report and recommended order, it has waived all objections to the order of the Board. There are, therefore, no objections to the order for this Court to consider.

The Labor Management Relations Act, 1947, in amending the National Labor Relations Act, not only made changes

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[3] Rules and Regulations of the N. L. R. B., Series 5, effective August 22, 1947 (12 F. R. 5656, 5662):

"Sec. 203.48 *Action of Board upon expiration of time to file exceptions to intermediate report.*—(a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes."

in the substantive law, but made significant changes in procedure as well. One of the procedural changes was the insertion in Section 10 (c) of the National Labor Relations Act of the following provision:

> In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

From the viewpoint of the procedure before the Board, the provision is clear. Pursuant to that provision, when the respondent failed to file exceptions to the intermediate report and recommended order, within the time specified, the Board adopted the recommended order as its own.

The effect of this provision, however, is not limited to Board procedure. By its terms, and when read in connection with Section 10 (e) of the Act, this provision has the effect of limiting the scope of review of Board orders by the Courts.

First, it will be noted that Congress did not end the provision by the words "such recommended order shall become the order of the Board," but added "and become effective as therein prescribed." The addition of the latter phrase is significant. Clearly, if all that Congress intended by the amendment was to have the recommended order of the trial examiner automatically become the order of the Board, there would have been no necessity for the addition of the phrase just quoted. The language of the amendment up to that point is sufficient in itself to accomplish that purpose. In determining the intent of Congress in adding the phrase "and become effective as therein prescribed," we must remember the fact that orders of the Board are not self-executing but become effective only after the entry of a decree by a circuit court of appeals. It follows,
82 therefore, that when Congress specified that the order shall become effective, it intended that a decree should be entered upon such an order so that it could be executed.

Second, the provision added by the amendment must be read in conjunction with the provision in Section 10 (e):

> No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Even before the enactment of the Labor Management Relations Act, 1947, the Supreme Court had held that this provision limits judicial review of Board orders to the specific exceptions filed with the Board. Referring to Section 10 (e), the Court in *N. L. R. B.* v. *Cheney California Lumber Company*, 327 U. S. 385, said at page 389:

> By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested.

To the same effect are: *Marshall Field and Company* v. *N. L. R. B.*, 318 U. S. 253, 255; *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9); *N. L. R. B.* v. *Cutler*, 158 F. 2d 677 (C. A. 1); *N. L. R. B.* v. *Van De Camp's Holland-Dutch Bakeries, Inc.*, 154 F. 2d 838 (C. A. 9); *N. L. R. B.* v. *Winter*, 154 F. 2d 719, 722, n. 7 (C. A. 10); *N. L. R. B.* v. *Draper Corporation*, 159 F. 2d 294, 298 (C. A. 1).[4]

In view of the Court's refusal to review specific issues which were not raised by exceptions to the intermediate report, it follows that where the respondent has filed no exceptions whatsoever there are no issues raised for review before the Court. Under such circumstances particularly in view of the strong language of the amendment inserted in Section 10 (e) above referred to, the Circuit Court of Appeals has nothing to review and should enforce the order of the Board.

The legislative history of the amendment of Section 10 (e) strongly supports this position. The amendment was objected to by the opponents of the Act, and the reasons for

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[4] The principle that judicial review is limited to specific exceptions filed with the Board is applicable to cases in which the Board seeks enforcement of its order, as well as to cases in which a respondent petitions the Court to review and set aside or modify the order. All of the cases cited were initiated by applications by the Board to enforce its orders.

Implicit in the rule is the well-established doctrine of exhaustion of administrative remedies. That doctrine has been applied not only to deny relief to a party who institutes an action against an agency without exhausting his administrative remedies, but also to bar defenses sought to be interposed under such circumstances in enforcement and criminal actions instituted by the Government. *Yakus* v. *United States*, 321 U. S. 414, 446; *Falbo* v. *United States*, 320 U. S. 549, 553; *United States* v. *Huzicka*, 329 U. S. 287, 292

the objection are set forth in House Minority Report No. 245 on H. R. 3020 (80th Cong., 1st Sess.) at page 93:

> The bill would further amend section 10 (c) of the National Labor Relations Act to provide that if no exceptions are filed within 20 days after service of a trial examiner's proposed report and recommended order "such recommended order shall become the order of the Board and become effective as therein prescribed."
>
> This provision is objectionable because it in effect suspends the doctrine of exhaustion of administrative remedies and permits a dissatisfied litigant to sidestep the agency by direct resort to the courts. The agency may be thus called upon to defend a decision it has not made, or be reversed as to rulings which, if error therein had been called to its attention by appropriate appeal, it might have itself corrected. Moreover, the status of trial examiners' reports is already covered by the Administrative Procedure Act of 1946 [sections 8 and 10 (c)] and there is no need at this time for further legislation on the subject.

However, Senator Taft, one of the authors of the amendatory legislation, answered this contention in an analysis which he inserted in the Congressional Record (93 Cong. Rec. 6860). Senator Taft analyzed the amendment as follows:

> Section 10 (c): In an effort to lessen the work load of the Board and facilitate its disposition of cases this subsection was amended to give finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. It has been stated that this permits an unsuccessful litigant to stand idly by while an erroneous report of a trial examiner becomes the order of the Board and then embarrass the Board when the case goes into the courts for enforcement. Several checks would prevent this happening. Section 10 (c) provides, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court."[3] In addition, the attorney trying the case would presumably file exceptions to such a report and the General Counsel in any event would not go forward with enforcement if the order was erroneous.

[3] The reference to Section 10 (c) is obviously a typographical error in the Congressional Record. The provision referred to appears in Section 10 (e).

In discussing this section, the Attorney General says (Attorney General's Manual, pp. 103-104):

> It is specifically provided that agency action otherwise final is final for the purposes of the subsection notwithstanding a party's failure to apply for any form of agency reconsideration (reopening, rehearing, etc.), unless a statute expressly requires an application for such reconsideration as a prerequisite to judicial review. Under statutes such as the Federal Power Act (16—U. S. C. 791, 825l) and the Natural Gas Act (15—U. S. C. 717r) which expressly require that such reconsideration be sought, the filing of an application for reconsideration will continue to be a condition precedent to judicial review. *In addition, it would seem that under the common statutory provision that no objection to agency action not urged before the agency shall be considered by the courts, an application for agency reconsideration remains a prerequisite to obtaining judicial review of such an objection.* See 15 U. S. C. 77 (i) and 49 U. S. C. 646 (e) (Emphasis supplied.)

The legislative history of Section 10 of the Administrative Procedure Act substantiates this view, and completely refutes the basis of the objections to the amendment of Section 10 (c) of the Labor Management Relations Act, 1947, which were urged in the House Minority Report.

The House Committee on the Judiciary in explaining Section 10 of the Administrative Procedure Act said: (H. Rep. No. 1980, 79th Cong., 2nd Sess., p. 55)

> The change is made to clarify the provisions by making specifically the language of the bill the explanation given in the Senate Committee report (p. 27). It should be noted that Section 8 (a) permits agencies to provide by rule for appeals to them from initial decisions of examiners. That provision, as well as this provision of Section 10 (c), would authorize an agency to adopt rules requiring a party to take a timely appeal to the agency before resorting to the courts. A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, or resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of

the time-honored doctrine of exhaustion of administrative remedies . . .

86 We submit that it is clear from the foregoing discussion that where no exceptions are filed to an intermediate report and recommended decision, Congress intended that such recommended decision become the order of the Board and that a decree be entered upon such order without review by the Court. Judicial recognition of this intent has been accorded by the every United States Court of Appeals in which the Board has heretofore moved for the summary entry of a decree enforcing its order upon the transcript of record in similar cases—by the United States Court of Appeals for the Seventh Circuit in *N. L. R. B.* v. *Ullin Box and Lumber Co.* (C. A. 7, No. 9588), the United States Court of Appeals for the Tenth Circuit in *N. L. R. B.* v. *Griffin-Goodner Grocery Company, Inc.* (C. A. 10, No. 3752) and the United States Court of Appeals for the Third Circuit in *N. L. R. B.* v. *John A. Gunn and Irving Levin, d-b a John A. Gunn and Company* (C. A. 3, No. 9822).

In all these cases the intermediate report and recommended order of the trial examiner were issued subsequent to the effective date of the Labor Management Relations Act, 1947. After the respondents failed to file a statement of exceptions within the time provided by Section 10 (c) of the National Labor Relations Act, as amended, the Board, pursuant to that section, adopted the findings, conclusions and recommended order of the trial examiner in each case and issued its orders therein. The Board then petitioned the appropriate Courts of Appeal for the summary entry of a decree upon the transcript of the record. In none of these cases did the respondents answer the Board's petition for enforcement or file a response to its motion.

The Board's motion in the *Ullin* case was granted, without opinion, on April 9, 1948, and the judgment prayed for was entered on May 5, 1948. In the *Griffin-Goodner* case, the motion was set for hearing on September 13, 1948. The respondent did not appear that date and the Court granted the Board's motion, from the bench, without hearing oral argument on behalf of the Board. No appearance was made on behalf of the respondents at the hearing of December 20, 1948, on the motion in the *Gunn* case either. The Court, from the bench, after hearing Board counsel, granted the Board's motion and ordered that a decree of enforcement issue.

Not only have the Board's motions for the summary entry of a decree upon the transcript of the record been granted in cases in which the respondents failed to file statements of exception within the time provided by Section 10 (c), but enforcement has also been granted recently in a case in which the Board proceeded upon such motion, based only upon that provision of Section 10 (c) of the Act which provides that no objection which has not been urged before the Board shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. In the case of *N. L. R. B.* v. *Hill Transportation Company and MacKenzie Coach Lines, Inc.* (C. A. 1, No. 4395), the Board's order issued after the Labor Management Relations Act, 1947, but the trial examiner's intermediate report and recommendations were rendered, and the time for filing exceptions thereto expired, before the Act was amended to include in Section 10 (c) thereof the provision that if no exceptions are filed within twenty days after service of the report and recommended order of the trial examiner, such recommended order shall become the order of the Board and become effective as therein prescribed. The Board urged that notwithstanding the non-applicability of that provision of Section 10 (c) to the case, a decree of enforcement should nevertheless issue by virtue of the operation of Section 10 (e) alone. No opposition was filed by the respondents, in bankruptcy, but counsel for the trustee in bankruptcy appeared specially at the hearing held on December 7, 1948. The United States Court of Appeals for the First Circuit, after hearing oral argument on the motion, granted the Board's motion for the summary entry of a decree upon the transcript of the record, and a decree to that effect was entered on the same date.

87 There are, of course, defenses which can be raised to prevent automatic court enforcement. Two defenses which may be raised to the entry of a decree are:

First, lack of jurisdiction of the Board. Since it is fundamental that jurisdiction over the subject matter cannot be conferred by consent or by failure to urge the objection, such defense may be urged in court, even though it was not urged below. However, where the facts upon which the Board based its jurisdiction are not in dispute, the action of the Court must be limited to a determination as to whether the undisputed facts show the existence of jurisdiction.

Second, the existence of extraordinary circumstances, which may excuse the failure or neglect to urge any objection. This defense is permitted by Section 10 (c) of the National Labor Relations Act, as amended. As to this defense, the burden is clearly upon a respondent to satisfy the Court as to the existence of such extraordinary circumstances. *N. L. R. B.* v. *National Mineral Co.*, 134 F. 2d 424, 429 (C. A. 7).

We respectfully submit that in the posture of this case, these are the only possible defenses which may be raised to the entry of a decree upon the order sought to be enforced. Even if the respondent should raise the defense that its failure to file exceptions should be excused because of extraordinary circumstances, that issue should be determined by the Court before it inquires into the merits of any other objections which the respondent may now desire to raise.

Conclusion

It is respectfully submitted that upon the record in this case a decree should be entered forthwith enforcing the order of the Board.

Respectfully submitted,

David P. Findling
Associate General Counsel

A. Norman Somers
Assistant General Counsel

Rose Mary Filipowicz
Attorney

National Labor Relations Board.

In the United States Court of Appeals
for the Fifth Circuit

88 *Motion of Mexia Textile Mills, Inc. for the Taking of Additional Evidence, and in Response to Petitioner's Motion for Summary Decree—Filed May 18, 1949.*

(File Endorsement Omitted)

(Title Omitted)

On December 18, 1947, the trial examiner issued an intermediate report on the above case, recommending that Respondent post the usual notices and enter into collective bargaining with the Union. On December 31, 1947, Respondent posted the notice to employees as recommended

by the trial examiner, and directed a letter to the Regional Director of the National Labor Relations Board, a copy of which letter is attached to this motion.

1.

Thereafter in the early part of the year 1948, Respondent entered into good faith bargaining with the Union and a number of meetings were held during the year 1948. The parties negotiated extensively and exchanged various proposals, looking to the execution of a written agreement, but no final contract has yet been reached.

2.

A complete stenographic transcript of the meet-
89 ings held during the year 1948 has been kept and preserved, and the Union has adopted an arbitrary, capricious and intransigent attitude which has prevented an agreement.

3.

Respondent alleges that it does not in good faith believe that the Union is now the collective bargaining representative, within the meaning of the National Labor Relations Act, for the majority of the employees within Respondent's plant. Respondent alleges that the collective bargaining relation that has existed since Respondent accepted the order of the Board is not reflected by the order of the Board, or in the record in the instant proceeding, and that the Board has no official knowledge of the facts and circumstances herein set forth by Respondent. That these facts and circumstances have occurred since the record in the instant case was closed and that Respondent was therefore unable to present these facts to the Board for its consideration. That the case has become moot by reason of the facts and circumstances hereinabove set forth. That the record in the instant proceeding relates to facts and transactions which occurred during the years 1945 and 1946, and particularly to a strike that occurred at about that time. That the Board should now take into account the existing facts and circumstances in the plant of the Respondent and determine whether the policies of the Act will be effectuated by a dismissal of the instant proceeding before the Board, or whether a new collective bargaining election should be conducted by the Board, or what other changes in the order of the Board may be requisite to effectuate the policies of the Act.

WHEREFORE, Respondent prays that the Court direct the Board to reopen this case for the purpose of permitting

Respondent to offer the additional evidence referred to in the above motion.

Respectfully submitted,

MEXIA TEXTILE MILLS, INC., *Respondent*
By SAMUELS, BROWN, HERMAN & SCOTT

JOHN M. SCOTT

JOHN M. SCOTT
1210 Electric Building
Forth Worth, Texas

90 *Duly sworn to by John M. Scott.*
Jurat omitted in printing. (All in italics.)

91 Dr. Edwin Elliott, Regional Director
National Labor Relations Board
1101 T & P Building COPY
Fort Worth, Texas

Re: Mexia Textile Mills, Inc.
Case No. 16-C-1301

Dear Doctor Elliott:

We have received a copy of the recommendations of Mr. Sidney Linder concerning the hearing held in Mexia in August of 1947, relation to our relations with the CIO during the years 1945 and 1946.

At the time the hearing was held the company did not see fit to argue with Mr. Schuler, the union representative, concerning the disagreements and strikes which even at that time involved matters two years old, and we can understand that since the company did not offer witnesses, Mr. Lindner's recommendations are based entirely on Mr. Schuler's contentions.

Be that as it may, however, the company's policy always has been that the employees have a right to belong to the union if they see fit and that they have a right to refuse to belong to the union if they see fit. At the time we put into effect the wage increases given our employees during the war period, we were of the opinion that they were justified and that the employees needed the increases. The failure to agree upon a contract with the union then was caused principally by the fact that the union insisted on requiring our employees to remain members or lose their jobs and the company never did see fit to agree to such a proposal.

All of that, however, is water under the bridge. The National Labor Relations Act provides now, as we under-

stand it, that neither side can make the other give any concessions and that the bargaining will be carried on free of intimidation and threats from either the union or the company. In such a spirit we are more than willing to accept the recommendations of Mr. Lindner and post the notice he requests in our plant. We are sending a copy of this letter to each of our employees, together with a copy of the notice, and forthwith posting it in our plant as requested by Mr. Lindner.

We are likewise sending a copy of this letter to the Union representative, Mr. Schuler. We assure you and Mr. Schuler that there are no hard feelings on the part of the company regarding the difficulties of 1945 and 1946, and we trust that our relations may be friendly in connection with such matters as Mr. Schuler may want to present to us in the future.

Yours very truly,

MEXIA TEXTILE MILLS
By

92 In the United States Court of Appeals
For the Fifth Circuit

No. 12763

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MEXIA TEXTILE MILLS, INC.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD SITTING AT WASHINGTON, D. C.

Opinion of the Court upon motion for the summary entry of a decree. Filed—June 3rd, 1949

ON MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR THE SUMMARY ENTRY OF A DECREE UPON THE TRANSCRIPT OF THE RECORD.

Before HUTCHESON, HOLMES, and WALLER,
Circuit Judges.

Per Curiam: The above motion came on to be heard by the court on the petition and brief of petitioner and on the

reply of respondent, and its motion to take additional evidence.

93 On consideration thereof, the Court is of the opinion that action on petitioner's motion should be deferred and the matter be referred back to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with by respondent; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises; and it is so ORDERED.[1]

94 NATIONAL LABOR RELATIONS BOARD,
No. 12763 versus
MEXIA TEXTILE MILLS, INC.

Order—June 3, 1949

The above motion came on to be heard by the court on the petition and brief of petitioner and on the reply of respondent, and its motion to take additional evidence.

On consideration thereof, the Court is of the opinion that action on petitioner's motion should be deferred and the matter be referred back to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with by respondent; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises; and it is so ORDERED.

95 Clerk's Certificate to foregoing transcript omitted in printing.

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[1] N. L. R. B. v. Pool Mfg. Co., (5th Cir. May 13, 1949). Cf. N. L. R. B. v. Prigg, 172 F(2) 948; N. L. R. B. v. Hill Bros., 161 F(2) 179.

96 Supreme Court of the United States
No....., October Term, 1949.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
v.
MEXIA TEXTILE MILLS.

Order Extending Time Within Which to File Petition for Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1949.

FRED M. VINSON
Chief Justice of the United States

Dated this 26 day of August, 1949.

97 In the Supreme Court of the United States
October Term, 1949

No.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
v.
MEXIA TEXTILE MILLS, INC.,
RESPONDENT

Stipulation—Filed Sept. 15, 1949

1. Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the parties hereto that for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the issues involved, the printed record shall consist of the following:

(a) Petition for enforcement.
(b) Order to file petition for enforcement.
(c) Certification of representatives.

(d) First amended charge.
(e) Notice of hearing.
(f) Complaint.
(g) Answer of respondent.
(h) Stipulation as to jurisdiction.
(i) Intermediate report of trial examiner.
(j) Order transferring case to National Labor Relations Board.
(k) Order of National Labor Relations Board.
98 (l) Certificate of the National Labor Relations Board.
(m) Motion for the summary entry of a decree with appendix attached.
(n) Motion of Mexia Textile Mills, Inc. for the taking of additional evidence and in response to petitioner's motion for summary decree.
(o) Opinion of the Court upon motion for the summary entry of a decree.
(p) Order deferring motion and referring matter back to the Board with directions.

2. It is further stipulated and agreed that either of the parties hereto may refer in its brief and argument to the unprinted portion of the record referred to above.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

JOHN M. SCOTT
Counsel for Respondent

September 12, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE - 858748 NO. 7 - - - - 1949

Supreme Court of the United States

No. 434—October Term, 1949

Order allowing certiorari—Filed January 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 434

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MEXIA TEXTILE MILLS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the Court of Appeals for the Fifth Circuit, entered on June 3, 1949, deferring action on the Board's motion for the summary entry of a decree and remanding this case to the Board with directions to take evidence and report on questions concerning compliance by the employer, Mexia Textile Mills, Inc., with the Board's order.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-37) are unreported. The *per curiam* opinion of the court of appeals (R. 58-59) is also unreported.

JURISDICTION

The order of the court of appeals was entered on June 3, 1949 (R. 59). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 60). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151 *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 17-19.

STATEMENT

Pursuant to an amended charge (R. 6-7) filed by Textile Workers Union of America, CIO, herein called the Union, the Board on June 27, 1947, issued its complaint (R. 8-10) against Mexia Textile Mills, Inc., herein called the Company, alleging that the

Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. A hearing on the complaint was held before a trial examiner who thereafter, on December 18, 1947, issued his intermediate report (R. 15-30) finding that the Company had refused to bargain with the Union, which had been duly certified by the Board as the exclusive bargaining representative of the Company's employees within an appropriate bargaining unit, in violation of Section 8 (5) and (1) of the Act. To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; and post appropriate notices (R. 31-34).

On December 18, 1947, the Board entered an order transferring the case to the Board and on the same day a copy of the order and the intermediate report were duly served upon the Company (R. 34). The Company at no time thereafter filed any exceptions to the intermediate report (R. 35). Section 10(c) of the Act, as amended,[1] and Rules 203.46 and 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, ef-

[1] Section 10(c) provides that the "examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

fective August 22, 1947 (12 F. R. 5656, 5662),[2] in effect at the time the intermediate report herein was issued, provide that if no exceptions are filed, the order recommended by the trial examiner shall become the order of the Board.

The Board, accordingly, on July 2, 1948, issued its order (R. 34-37), adopting the findings, conclusions and recommended order set forth in the intermediate report. On April 11, 1949, the Board filed in the court below the certified record in the case and its petition for enforcement of its order (R. 1-5, 37-38). Thereafter, on May 6, 1949, the Board filed a motion for the summary entry of a decree upon the transcript of the record (R. 38-55), alleging that in view of Section 10(c), mentioned above, and of Section 10(e) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered before the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, there were no contestable issues before the court.

In response to the Board's motion for the summary entry of a decree, the Company, on May 16, 1949, filed in the court below a motion to adduce

[2] The Rules provide that any party desiring to file exceptions to an intermediate report and recommended order must do so within twenty days from the date of the service of the order transferring the case to the Board and that if no such exceptions are filed, the findings, conclusions and recommendations contained in the intermediate report and recommended order shall be adopted by the Board as its findings, conclusions and order, and that all objections and exceptions thereto shall be deemed waived for all purposes.

additional evidence (R. 55-58). In its motion, the Company alleged that it had complied with the order recommended by the trial examiner and that it did not believe that the Union continued to represent a majority of its employees.

The court below, on June 3, 1949, entered its order deferring action on the Board's motion for the summary entry of a decree and remanding the case to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 59).[3]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for

[3] The Board was in the process of preparing an answer to the motion to adduce at the time it received the court's order. However, the court had before it, in *National Labor Relations Board* v. *Pool Manufacturing Company*, decided by the court below on May 13, 1949 (24 L. R. R. M. 2147), involving a like situation, the Board's opposition to the Company's motion for leave to adduce additional evidence. The court below nevertheless entered an order in the *Pool* case identical with the order entered in this case. The Board is simultaneously herewith petitioning this Court for a writ of certiorari in the *Pool* case.

summary entry of a decree upon the transcript of the record.

REASONS FOR GRANTING THE WRIT

This is one of the five cases which, as is set forth in the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, pp. 10-23, filed contemporaneously, the Board has selected as the means for bringing to the attention of this Court its difficulties in securing enforcement of its orders in the Fifth Circuit.

1. In remanding this case to the Board for the purpose of taking testimony and reporting on questions concerning compliance by the Company with the Board's order, the court below failed to observe the ruling of this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, recently reiterated in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225, that "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." Notwithstanding the discontinuance by an employer of a proscribed practice, the Board is "entitled to bar its resumption" by obtaining a court decree enforcing its order. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230. Cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257.

A Board order "speaks as of the time of the hearing and is founded upon the record before the Board." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2). The effect of a court decree enforcing a Board order, therefore, is to approve the validity of the order as of the date it was entered, and problems arising out of occurrences subsequent to that date should "properly * * * be resolved by the Board on direct resort to it, or by the court it contempt proceedings are instituted." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106. Accordingly, the entry of a court decree enforcing a Board order does not necessarily mean that the employer must take affirmative action which he has already taken or which intervening circumstances have rendered unnecessary.[4] Thus, if, prior to a court decree requiring the employer to offer back pay to a discriminatorily discharged employee, the employer has already given the employee back pay, he need not do so again subsequent to the decree. Similarly, if at the time of the entry of a court decree enforcing a bargaining order, the employer has already bargained in good faith for a period long enough to dissipate the effects of its unfair labor practice and also long enough to permit the bargaining relationship to

[4] Cf. *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8).

work successfully and thereafter the Union, for reasons other than the employer's unfair labor practices, has lost its majority status, the court decree would not have the effect of requiring the employer to renew its bargaining with the Union. In the last hypothetical situation, unless unfair labor practices in addition to a refusal to bargain were involved, it is unlikely that the Board would petition a court for enforcement of its bargaining order; but if it did, the Board, subsequent to the enforcement decree, would probably entertain a representation or decertification petition rather than attempt to require the employer to renew bargaining negotiations. Even then, an enforcement decree might be advantageous, for, if the Union reestablished its majority status and the employer again refused to bargain with it, the Board could institute contempt proceedings in court rather than start anew with another unfair labor practice proceeding. In any event, if the Board should attempt to act arbitrarily or unreasonably, the court can give adequate protection to the employer's rights in any contempt proceeding which might be brought.

2. The courts of appeals, except the court below, have uniformly followed this Court's ruling and have refused to litigate questions of compliance as a condition precedent to the entry of an enforcement decree.[5] Even the court below has, upon

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[5] See *e.g.*, the following cases:
First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations*

at least three occasions in the past ruled that allegations by the employer that he has complied with the Board's order are no defense to the entry of an enforcement decree.[6]

The court below in this case and in *National Labor Relations Board* v. *Pool Manufacturing Company*, decided May 13, 1949, 24 L. R. R. M. 2147, in which the Board is simultaneously herewith petitioning this Court for a writ of certiorari, has apparently departed from its earlier decisions relat-

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Board v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Leftie Lee, Inc.*, 140 F. 2d 243, 250 (C. A. 9); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

[6] See, *National Labor Relations Board* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884 (C. A. 5); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); and *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497, 498 (C.A. 5).

ing to the materiality of compliance to the enforcement of Board orders. It has stated no reason for such departure. The only distinction which we can see between the instant cases and the earlier cases is the fact that the instant cases involve Board orders requiring the employer to bargain collectively as a remedy for violations of Section 8 (5) of the Act, whereas the Board orders in the three earlier cases required the employers to remedy violations of Section 8 (1), (2) or (3) of the Act. We do not believe, however, that the nature of the unfair labor practice involved alters the principles applicable, nor has the court below so indicated. Moreover, none of the other courts of appeals has made any such distinction. In fact, in five of the cases wherein the other courts of appeals ruled that questions concerning compliance were irrelevant in enforcement proceedings, the Board orders involved included a requirement that the employer bargain collectively.[7] The conflict between the decision below and those of the other circuits is apparent.

3. The Board considers it important in the administration of the Act that the courts not predi-

[7] See *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252 (C. A. 1); *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619 (C. A. 6); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250 (C. A. 9); and *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590 (C.A. D.C.).

cate enforcement of Board orders upon the basis of obedience or disobedience of such orders. After the Board has administratively determined the desirability of obtaining an enforcement decree—whether such determination is based on its opinion that the order has not been obeyed or, if obeyed for a while, that the unfair labor practices enjoined are being repeated or are likely to be repeated,[8]—the reason for the Board's request for an enforcement decree should not be the subject of litigation. To open the wisdom of this administrative determination to review by the courts might, in the words of Judge Goodrich, make "a merry-go-round of

[8] The Board's practice in this regard, published in the Federal Register (12 Fed. Reg. 5651) as a part of its Statements of Procedure, effective August 22, 1947, is described as follows:

Sec. 202.13 *Compliance with Board decision and order.*—(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) The regional director submits to the Board a report on compliance when compliance is obtained. This report must meet the approval of the Board before the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

Sec. 202.14 *Judicial review of Board decisions and orders.*—If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. * * *

the Act." *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. A. 3). If a plea of compliance can now validly hold up enforcement of the order in this case, then it can just as validly hold up enforcement of the order after the Board has conducted a hearing of the kind directed by the court below; the case might again be remanded to determine compliance questions which might arise subsequent to the second hearing, and so on *ad infinitum*. Success in the administration of legislation such as the Act depends in large measure upon the promptness with which its guarantees are enforced and the course of action directed by the court below therefore seriously jeopardizes the effectual administration of the Act.

Congress, foreseeing these possibilities both at the time of the enactment of the original Act in 1935 as well as at the time it amended the Act in 1947, refused to make compliance with a Board order a basis for withholding an enforcement decree. To obviate the materiality of questions of compliance, the Conference Committee, in 1935, deliberately adopted the language of Section 10 (e) of the Act (49 Stat. 449) instead of the language in the original Federal Trade Commission Act (38 Stat. 717, 720), which had been proposed in the Senate bill, because some courts had interpreted the latter Act as making non-compliance a condition precedent to the right of the Federal Trade Commission to obtain enforcement decrees. In making this change, the Conference Committee ex-

plained (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

> Section 10(c) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

The legislative history of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, discloses that Congress again considered and rejected proposals that Section 10(e) be amended to make compliance with Board orders an issue in enforcement proceedings. See H.R. 3020, as reported, 80th Cong., 1st Sess., p. 40; H.R. 3020, as passed by the House, 80th Cong., 1st Sess., p. 40; Report of the House Committee on Education and Labor, H. Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess., p. 43; H. Rep. No. 245, Minority Report, p. 93; Conference Report, to accompany H.R. 3020, H. Rep. No. 510, 80th Cong., 1st Sess., p. 55. These documents are reprinted in Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 70, 197, 334, 384, 559.[9]

We believe that in remanding this case to the Board with directions to take evidence and report on questions concerning the employer's compliance with the Board's order, the court below has plainly acted contrary to the clear legislative intent shown above, implemented by the decisions of this Court and all of the courts of appeals which have passed on the question.

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[9] Even if Congress had not specifically rejected the theory upon which the court below acted, its reenactment, without change, of the provision of Section 10(e) in question after many years of uniform judicial construction and application amounts to an expression of legislative satisfaction with the construction so adopted. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500; *Heald* v. *District of Columbia*, 254 U.S. 20, 23.

4. Since, as shown in the Statement, *supra*, pp. 3-5, the Company has never contested the validity of the Board's order either before the Board or before the court below, no issue as to the propriety of the order exists (Section 10 (c) and (e) of the Act, as amended).[10] The court below, accordingly, was under a duty to enforce the Board's order. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 342-343. This Court, in the latter case, aptly described the duty of the court of appeals in the statutory scheme, as follows:

> Congress has placed the power to administer the National Labor Relations Act in the

[10] In filing its motion in the court below for the summary entry of a decree upon the transcript of the record, dispensing with the necessity of printing the record and orally arguing before the court, the Board followed its usual procedure in cases of this type. This procedure has been uniformly approved by the courts, including the court below. See *National Labor Relations Board* v. *Cordele Manufacturing Co.*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Amory Garment Company*, 24 L. R. R. M. 2274 (C. A. 5); *National Labor Relations Board* v. *Rowland* (C. A. 5, No. 12829); *National Labor Relations Board* v. *Woodruff* (C. A. 5, No. 12850); *National Labor Relations Board* v. *Ullin Box and Lumber Co.* (C. A. 7, No. 9588); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.* (C. A. 10, No. 3752); *National Labor Relations Board* v. *Gunn* (C. A. 3, No. 9822); *National Labor Relations Board* v. *Star Metal Mfg. Co.* (C. A. 3, No. 9981); *National Labor Relations Board* v. *Hill Transportation Co.* (C. A. 1, No. 4395); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C. A. 6, No. 10847).

Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this petition for a writ of certiorari should be granted, and that the order entered by the court below on June 3, 1949, should be reversed without oral argument and the case remanded to the court below with directions to enter a decree enforcing the Board's order as requested in its petition for enforcement and in its motion for the summary entry of a decree.

ROBERT N. DENHAM,
General Counsel,

PHILIP B. PERLMAN,
Solicitor General.

National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141 *et seq.*) are as follows:

SEC. 10.

* * * * *

(c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the plead-

ings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 434

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MEXIA TEXTILE MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 15-37) are not reported. The *per curiam* opinion of the Court of Appeals (R. 58-59) is reported in 25 L. R. R. M. 2295.

JURISDICTION

The order of the Court of Appeals was entered on June 3, 1949 (R. 59). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a

petition for a writ of certiorari was extended to and including October 28, 1949 (R. 60). On October 28, 1949 the Board filed its petition for a writ of certiorari, which was granted on January 9, 1950 (338 U. S. 909). The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 25-27.

STATEMENT

Pursuant to an amended charge (R. 6-7) filed by Textile Workers Union of America, CIO, herein called the Union, the Board on June 27, 1947, issued its complaint (R. 8-10) against Mexia Textile Mills, Inc., herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. In its answer the company denied that the Union "is now the exclusive representative of all

the employees" in the unit agreed to be appropriate for the reason that such employees had withdrawn from membership in the Union; it further denied that it had engaged in any unfair labor practices (R. 11, 12-13). A hearing on the complaint was held before a trial examiner who thereafter, on December 18, 1947, issued his intermediate report (R. 15-30) finding that the Company had refused to bargain with the Union, which had been duly certified by the Board as the exclusive bargaining representative of the Company's employees within an appropriate bargaining unit, in violation of Section 8 (5) and (1) of the Act. The examiner found no merit in the contention that the Union no longer represented a majority of the employees (R. 18).

The trial examiner's conclusion that the Company had refused to bargain was based upon evidence summarized in his intermediate report showing that from almost the inception of bargaining conferences on November 25, 1944, and thereafter throughout the period of over two years before the Board hearing, the Company manifested its intention never to reach any agreement with the Union (R. 19-30). This settled intention, the trial examiner found, was in effect announced by the Company's attorney and bargaining representative, Scott, early in the negotiations, when he told the Union that it would never succeed in obtaining a bargaining contract because the Company's

officials lacked an understanding of the problems of labor relations and were violently antagonistic toward the CIO and its international unions (R. 20, 28). The trial examiner also found that the Company manifested its intention never to enter into an agreement with the Union by its conduct in repeatedly purporting to shift responsibility for its decisions and actions from one of its representatives to another; in making and thereafter repudiating promises and tentative agreements; in refusing to sign a contract embodying the Company's own terms assertedly for the sole reason that it was not ready to sign a contract; in delaying upon some occasions and refusing upon other occasions to meet with union representatives; in unilaterally determining and announcing wage increases and changes in working conditions during the period when the Union was attempting to bargain in regard to them; and in continuously refusing to meet with the Union's grievance committee. To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; and post appropriate notices (R. 31-34).

On December 18, 1947, the Board entered an order transferring the case to the Board and, on the same day, a copy of the order and the intermediate report were duly served upon the Company (R. 34). The Company at no time there-

after filed any exceptions to the intermediate report (R. 35). Section 10 (c) of the Act, as amended,[1] and Rules 203.46 and 203.48 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947 (12 F. R. 5656),[2] in effect at the time the intermediate report herein was issued, provide that if no exceptions are filed, the order recommended by the trial examiner shall become the order of the Board.

The Board, accordingly, on July 2, 1948, issued its order (R. 34-37), adopting the findings, conclusions and recommended order set forth in the intermediate report. On April 11, 1949, the Board filed in the court below the certified record in the case and its petition for enforcement of its order (R. 1-5, 37-38). Thereafter, on May 6, 1949, the Board filed a motion for the summary entry of a decree upon the transcript of the record (R. 38-55),

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[1] Section 10 (c) provides that the "examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

[2] The Rules provide that any party desiring to file exceptions to an intermediate report and recommended order must do so within twenty days from the date of the service of the order transferring the case to the Board and that if no such exceptions are filed, the findings, conclusions and recommendations contained in the intermediate report and recommended order shall be adopted by the Board as its findings, conclusions and order, and that all objections and exceptions thereto shall

alleging that in view of Section 10 (e), mentioned above, and of Section 10 (c) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, there were no contestable issues before the court.

In response to the Board's motion for the summary entry of a decree, the Company, on May 16, 1949, filed in the court below a motion to adduce evidence (R. 55-58). In its motion, the Company alleged that it had complied with the order recommended by the trial examiner and that it did not believe that the Union continued to represent a majority of its employees.

The court below, on June 3, 1949, entered its order deferring action on the Board's motion for the summary entry of a decree and remanding the case to the Board with directions to take evidence and report: (1) whether and to what extent its order had been complied with; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 59).[3]

[3] The court below did not direct the Board to take evidence as to whether, as the Company claimed, the Union had ceased to represent a majority of the Company's employees. Cf. *Franks Bros. Company* v. *National Labor Relations Board*, 321 U. S. 702.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

SUMMARY OF ARGUMENT

I

In proceedings under Section 10 (e) or (f) of the Act to enforce an order of the Board, leave may be granted in appropriate circumstances to adduce additional evidence where it is shown to the satisfaction of the court that the evidence is material. As shown by the decisions of this Court, the legislative history and the decisions of all of the courts of appeal which have considered the matter, evidence that the Board's order has been complied with is not material. The fact that respondent has complied with the Board's order may be shown as a defense in proceedings to adjudge respondent in contempt for failing to obey a court decree enforcing the Board's order, but until such a decree has been entered the question

f compliance cannot be put in issue. This rule s essential to the effective enforcement of the Act. Since the only issue of fact on which the Court lirected the Board to take evidence was whether nd to what extent the Company has complied with he Board's order, its action in remanding the case o the Board was clearly erroneous.

II

Since the Company never contested the validity of the Board's order either before the Board or before the court below and has never asked leave to adduce additional material evidence tending to show that the order should not now be enforced, he court erred in failing to grant the Board's motion for summary entry of a decree enforcing the order.

ARGUMENT

I

The Court Below Erred in Remanding the Case to the Board With Directions to Take Evidence and Report to It on Questions Concerning Compliance With the Board's Order

Section 10 (e) authorizes the court to remand a cause to the Board for the purpose of taking additional evidence where it is shown to the satisfaction of the court that the "*evidence is material* and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." (Italics supplied.) Applications for leave to adduce additional evidence under

this provision are addressed to the sound discretion of the court, *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, but here, as elsewhere in the law, the discretion must be exercised subject to the conditions imposed by statute. Cf. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30-31. One of the conditions imposed by the Act upon the granting of leave to adduce additional evidence is that the evidence be material. As this Court had occasion to point out in *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104, "to ensure that the applicable part of Section 10 (e) would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that *before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence* * * *." (Italics supplied.)

In the case at bar, the court below remanded the cause to the Board for the purpose of taking evidence and reporting first, as to "whether and to what extent its order has been complied with by respondent"; secondly, as to "whether and why, if the order has been complied with, the matter should not be dismissed as moot"; and thirdly, "if the matter is not moot, what recommendations or requests the Board has to make in the premises" (R. 59). The substance and effect of the court's order was to remand the cause to the Board for the purpose of taking evidence on the question

whether the Company had complied with the Board's order. Such evidence is clearly not relevant or material under the rule enunciated by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, and reaffirmed as recently as May, 1949 in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225: "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." From this rule and its corollary that notwithstanding the discontinuance by an employer of an unfair labor practice the Board is "entitled to bar its resumption", *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; cf. *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, it is apparent that evidence of compliance cannot affect the outcome of a proceeding to enforce a Board order. To permit the production of such evidence would only serve to delay the proceeding and thus thwart the very purpose for which the requirement of materiality was inserted in the statute. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104.

Not only the decisions of this Court, but the legislative history of the Act as well, makes it abundantly clear that the question of compliance

cannot properly be put in issue in a proceeding to enforce an order of the Board. Congress, foreseeing the possibilities of delay and confusion that might otherwise result, refused at the time it passed the original Act and again when it amended the Act in 1947, to make compliance with a Board order a basis for withholding an enforcement decree. To obviate the materiality of questions of compliance, the Conference Committee, in 1935, deliberately adopted the language of Section 10 (e) of the Act (49 Stat. 449) instead of the language in the original Federal Trade Commission Act (38 Stat. 717, 720), which had been proposed in the Senate bill, because some courts had interpreted the latter Act as making non-compliance a condition precedent to the right of the Federal Trade Commission to obtain enforcement decrees. In making this change, the Conference Committee explained (H. Rep. No. 1371, 74th Cong., 1st sess., p. 5):

> Section 10 (e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes "The Board shall have power to" petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure

due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

The legislative history of the Labor Management Relations Act, 1947, discloses that Congress again considered and rejected proposals that Section 10 (c) be amended to make compliance with Board orders an issue in enforcement proceedings. Section 10 (c) of the House bill provided that "If any person against whom an order of the Board shall issue fails to comply therewith within such reasonable period as the Board shall specify, or thereafter shall violate such order, the Administrator shall petition" for enforcement of the Board's order. H. R.

3020, as passed by the House, 80th Cong., 1st Sess., p. 40; Report of the House Committee on Education and Labor, H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 43; H. Rep. No. 245, Minority Report, p. 93. The Senate bill retained the language of Section 10 (c) of the Wagner Act. H. R. 3020, as passed by the Senate, 80th Cong., 1st Sess., p. 96; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26. The Conference Committee recommended adoption of the version of Section 10 (c) contained in the Senate bill, and Congress enacted that provision. H. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 55.[4] Even if Congress had not specifically passed upon the amendment proposed in the House bill, its reenactment, without change, of the provision of Section 10 (e) in question after many years of uniform judicial construction and application would be deemed an expression of legislative satisfaction with the construction so adopted. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *Heald* v. *District of Columbia*, 254 U. S. 20, 23.

With the exception of the court below, all of the courts of appeals which have had occasion to pass on the question have uniformly refused to permit questions of compliance to be litigated as a condition precedent to the entry of an enforcement de-

[4] These documents cited in this paragraph are reprinted in Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 70, 197, 334, 384, 559.

cree.[5] Even the court below, in decisions rendered both before and since the one under review, has ruled that allegations by the employer that he has complied with the Board's order are no defense to an application to enforce the order. *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497, 498 (C. A. 5); *National Labor Relations Board* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884 (C. A. 5); *National Labor Relations Board* v. *Hills Bros.*

[5] See *e.g.*, the following cases:

First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations Board* v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Fourth Circuit: *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 55-56.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 621; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250; *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

Tenth Circuit: *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners*, 178 F. 2d 402; *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 118 F. 2d 304, 307.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

Co., 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); and *National Labor Relations Board* v. *The Cooper Company*, 179 F. 2d 241 (C. A. 5). In its latest decision, *National Labor Relations Board* v. *The Cooper Company*, *supra*, the court below said that the decisions now under review in this and in its companion case, *National Labor Relations Board* v. *Pool Manufacturing Company*, No. 435, this Term, were not intended to be departures from the rule followed in the *Hills Bros. Co.* and *Davis* cases, *supra*, adding—

> Indeed, nothing was decided there [i.e., in this and the *Pool* case]. The court, expressly deferring decision, merely referred the matter back to the Board for its assistance in furnishing further information and for its recommendations or requests in the light of such further information.

Although the court below has thus disclaimed an intention to hold that proof of compliance with a Board order may bar an enforcement decree, its action in remanding the case to the Board to take evidence and report on the question of compliance results in the very delay which Congress sought to avoid by making evidence of compliance immaterial at this stage. The remand was ordered in response to an application for leave to adduce additional evidence pursuant to Section 10 (e). Where, as here, the evidence sought to be adduced is immaterial, the

terms and policy of Section 10 (e) preclude reliance upon such evidence as a basis for delay in enforcing the Board's order.

In its brief in opposition to the petition for a writ of certiorari (p. 5), the Company itself tacitly conceded that compliance is not a defense to the Board's petition for enforcement. It said, "This case does not involve a contention on the part of the Respondent, nor a judicial determination, to the effect that mere compliance with the order of the Board is sufficient of itself to prevent a judicial decree of enforcement." The Company called attention to the fact that it sought leave to adduce additional evidence to show not only that it had complied with the Board's order so far as it was able to do so, but also that a year and a half had elapsed since the Board's order was entered and that in the interim the Union may have ceased to represent a majority of the Company's employees, another labor organization having asserted that it represents a substantial number of such employees. It seems to be the Company's contention that while compliance standing alone is not a defense, compliance when coupled with a lapse of time and the loss by a collective bargaining representative of its majority is a defense to an application to enforce an order of the Board requiring an employer to bargain with such representative. The contention is palpably unsound. The short answer to it is that the court below did not direct the Board to

take evidence on the question whether the Union had lost its majority. In any case, loss by a union of its majority is not a defense to a proceeding such as this where, as here, the loss follows a refusal to bargain or other unfair labor practice on the part of the employer. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702. If the Union has lost its majority and another labor organization has presented to the Company a claim to be recognized as the collective bargaining representative of its employees, those facts would support an application to the Board by either the Company or the labor organization for an election,[6] but they cannot serve to defeat enforcement of the Board's order. Nor can delay by the Board in seeking enforcement of the order, in and of itself, be asserted as a defense. *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 200, affirming, 113 F. 2d 202, 206 (C. A. 2); *National Labor Relations Board* v. *Todd Co.*, 173 F. 2d 705.

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[6] Section 9 (c) (1) (B) provides that "Whenever a petition shall have been filed * * * by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9 (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Even when no other labor organization is claiming to be the statutory representative, the employees may seek to rid themselves of an incumbent union by filing a decertification petition pursuant to Section 9 (c) (1) (A).

708 (C. A. 2); *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *Sewell Manufacturing Co.*, 172 F. 2d 459, 461 (C. A. 5); *National Labor Relations Board* v. *La-Salle Steel Co.*, 178 F. 2d 829, 835-836 (C. A. 7); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9), certiorari denied, 338 U. S. 827.

Compliance with the Board's order either before or after entry of a decree of enforcement may, of course, be asserted as a defense to a proceeding to adjudge the party to whom the decree is directed in contempt for failure to obey its command. But until a decree is entered, compliance or noncompliance is an irrelevant issue. A Board order "speaks as of the time of the hearing and is founded upon the record before the Board." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 177 F. 2d 417, 421 (C. A. 2). The effect of a court decree enforcing a Board order, therefore, is to approve the validity of the order as of the date it was entered, and problems arising out of occurrences subsequent to that date should "properly * * * be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 106. Accordingly, a court decree enforcing a Board order is not an inexorable command to the employer to take affirmative action

which he has already taken [7] or which because of intervening circumstances cannot be taken.

Thus, if prior to a court decree requiring the employer to offer back pay to a discriminatorily discharged employee, the employer has already given the employee back pay, he need not do so again subsequent to the decree. Similarly, if, at the time of the entry of a court decree enforcing a bargaining order, the employer has already bargained in good faith for a period long enough to dissipate the effects of its unfair labor practice and also long enough to permit the bargaining relationship to work successfully, and thereafter the Union, for reasons other than the employer's unfair labor practices, loses its majority status, the court decree requiring the employer to resume bargaining with the Union need not be the last word. In the last hypothetical situation, unless unfair labor practices in addition to a refusal to bargain were involved, it is unlikely, in the first place, that the Board would petition a court for enforcement of its bargaining order; but if it did, the Board, subsequent to the enforcement decree, would probably entertain a representation or decertification petition rather than attempt to require the employer to renew bargaining negotiations. Even then, an enforcement decree

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[7] Cf. *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421 (C. A. 2); *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180 (C. A. 5); *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 224 (C. A. 8).

might be advantageous, for, if the Union reestablished its majority status and the employer again refused to bargain with it, the Board could institute contempt proceedings rather than start anew with another unfair labor practice proceeding.

The entry of a decree enforcing a Board order without affording the respondent the opportunity of litigating the question of compliance imposes no hardship on him. "After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches to a finding against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily that will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind." *National Labor Relations Board* v. *General Motors Corporation,* 179 F 2d 221, 222 (C. A. 2). So long as the respondent does not wilfully violate the decree he cannot be held guilty of criminal contempt. Cf. Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 Columbia Law. Rev. 780, 793. He may, of course, be adjudged guilty of civil contempt even though the violation of the decree is not wilful. *McComb*

v. *Jacksonville Paper Co.*, 336 U. S. 187, 191. But in such a case only a remedial sanction may be imposed. To use the oft-repeated metaphor of Judge Sanborn, the respondent "carries the keys to his prison in his pocket." *In re Nevitt*, 117 Fed. 448, 461 (C. A. 8); *Maggio* v. *Zeitz*, 333 U. S. 56, 68; *Penfield* v. *Securities and Exchange Commission*, 330 U. S. 585, 590.

Only by treating the question of compliance as irrelevant in enforcement proceedings can delay and impediment to the proper administration of the Act be avoided. After the Board has administratively determined the desirability of obtaining an enforcement decree—whether such determination is based on its opinion that the order has not been obeyed, or, if obeyed for a while, that the unfair labor practices enjoined are being repeated or are likely to be repeated,[8] the reason for the

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[8] The Board's practice in this regard, published in the Federal Register (12 Fed. Reg. 5651) as a part of its Statements of Procedure, effective August 22, 1947, is described as follows: "Sec. 202.13. *Compliance with Board decision and order.*—(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order. (b) The regional director submits to the Board a report on compliance when compliance is obtained. This report must meet the approval of the Board before the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order

Board's request for an enforcement decree should not be the subject of litigation. To open the wisdom of this administrative determination to review by the courts might, in the words of Judge Goodrich, make "a merry-go-round of the Act." *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. A. 3). If a plea of compliance can now validly hold up enforcement of the order in this case, then it can just as validly hold up enforcement of the order after the Board has conducted a hearing of the kind directed by the court below; the case might again be remanded to determine compliance questions which might arise subsequent to the second hearing, and so on *ad infinitum*. Successful administration of legislation such as the Act depends in large measure upon the promptness with which its guarantees are enforced. The course of action directed by the court below therefore seriously jeopardizes the effectual administration of the Act.

II

The Court Below Erred in Not Granting the Board's Motion for Summary Entry of a Decree Upon the Transcript of Record

Since, as shown in the Statement, *supra*, pp. 4-6, the Company has never contested the validity

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with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

"Sec. 202.14. *Judicial review of Board decisions and orders.* If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. * * *"

of the Board's order either before the Board or before the court below, no issue as to the propriety of the order exists (Section 10(c) and (e) of the Act, as amended).[9]

The court below, accordingly, was under a duty to enforce the Board's order. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 342-343. This Court, in the latter case, aptly described the duty of the court of appeals in the statutory scheme, as follows:

> Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If

[9] In filing its motion in the court below for the summary entry of a decree upon the transcript of the record, dispensing with the necessity of printing the record and orally arguing before the court, the Board followed its usual procedure in cases of this type. This procedure has been uniformly approved by the courts, including the court below. See *National Labor Relations Board* v. *Cordele Manufacturing Co.*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *Davis*, 172 F. 2d 225 (C. A. 5); *National Labor Relations Board* v. *The Cooper Co.*, 179 F. 2d 741 (C. A. 5); *National Labor Relations Board* v. *Amory Garment Company*, 24 L. R. R. M. 2274 (C. A. 5); *National Labor Relations Board* v. *Rowland* (C. A. 5, No. 12829); *National Labor Relations Board* v. *Woodruff* (C. A. 5, No. 12850); *National Labor Relations Board* v. *Ulin Box and Lumber Co.* (C. A. 7, No. 9588); *National Labor Relations Board* v. *Griffin-Goodner Grocery Co., Inc.*, (C. A. 10, No. 3752); *National Labor Relations Board* v. *Gunn* (C. A. 3, No. 9822); *National Labor Relations Board* v. *Star Metal Mfg. Co.* (C. A. 3, No. 9981); *National Labor Relations Board* v. *Hill Transportation Co.* (C. A. 1, No. 4395); *National Labor Relations Board* v. *Lancaster Foundry Corporation* (C. A. 6, No. 10847).

the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

CONCLUSION

It is respectfully submitted that the order of the court below should be reversed and the cause remanded with instructions to enter a decree enforcing the Board's order.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Acting Assistant General Counsel,

ALBERT M. DREYER,
Attorney,
National Labor Relations Board.

APRIL 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. (Supp. II) 141, *et seq.*) are as follows:

* * * * *

SEC. 10.

* * * * *

(c) * * * In case the evidence is presented before a member of the Board, or before an

examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before

the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

NO. 434

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

MEXIA TEXTILE MILLS, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

SAMUELS, BROWN, HERMAN & SCOTT
1210 Electric Building
Fort Worth, Texas
Attorneys for Respondent

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Respondent, Mexia Textile Mills, Inc., pursuant to Rule 7, Paragraph 3, and in lieu of a motion to dismiss the petition for certiorari, asserts the following objections to the jurisdiction of this Court, and to the granting of the writ:

(a) The instant case does not involve matters of general public interest, or of public importance, but is admittedly shown to be brought before this Court

because of the Board's alleged difficulties in securing enforcement of its orders in the Fifth Circuit. This Court does not have jurisdiction to consider this case upon the ground that the Board d e s i r e s that the Judges of the Fifth Circuit Court be reprimanded and brought into conformance with the Board's conception of its policy and duty, nor to cause the Fifth Circuit's ratio of decisions in favor of the Board to conform to the average of other Circuits.

(b) This Court is without jurisdiction under the law to act as monitor of the several United States Court of appeal and the petition for certiorari should be stricken and denied because of the improper action of counsel for Petitioner in using the petition as a vehicle for criticism of the Judges of the Fifth Circuit, coupled with counsel's action in releasing the contents of the petition to the newspapers for the sole and only purpose of intimidating and embarrassing the Judges of the Fifth Circuit.

(c) Petitioner did not give timely notice of its action in securing an extension of the time for filing the petition for certiorari, and in the absence of such notice, this Court should view the judgment of the Fifth Circuit as final and decline jurisdiction because of the covert action of the Petitioner.

(d) The judgment of the Court below in granting Respondent's motion to take additional evidence under Section 10 (e) of the applicable statute was proper.

ARGUMENT

I.

Grounds (a) and (c) that the case is not of public importance and jurisdiction does not lie to monitor the Fifth Circuit.

Respondent believes and will hereafter show that the order of the Fifth Circuit was proper under the applicable provisions of the statute governing this proceeding. But more important to the policy of this Court, and of concern to Respondent's counsel, is the effort to use certiorari as an intimidatory method of expressing the statistical pique of the National Labor Relations Board. When that admitted effort is coupled with a deliberate attempt to influence the action of this Court by newspaper publicity, dismissal of the petition and denial of the writ are appropriate.

Petitioner, under the law, occupies the same position before this Court as any other suitor. It occupied a similar status before the Court below. In its administrative capacity, and in its role as prosecutor, the National Labor Relations Board, within the statute, has a justified administrative bias against all employers. In its capacity as litigant, however, the statute contemplates that it is a litigant and nothing more. Its representatives owe the respect to law and the judiciary due alike from all officers of the Court. Each particular case must stand or fall on its own merits. The Courts have not yet been made an auxiliary to the administrative function of the Executive Department

of the Government. Notwithstanding the statutory weight accorded the findings of the Board, its determinations of law and its rights as a party litigant are governed by principles binding alike upon it and the individual citizen in opposition. That is not the conception of the litigation presented by the petition for certiorari. The Board uses its administrative desire and policy as an end toward which the judicial process is to be directed, whereas under our Constitution, the judicial process is directed solely at equal justice, irrespective of whether the Board's conception of its policy is served or hindered.

Obviously, the petition for certiorari is bottomed upon facts wholly outside the record, particularly wherein the Board asserts the results of its litigation in other Circuits. Respondent has no knowledge of whether the Board's statements of fact in that regard are true, but Respondent is unwilling to have this Court act upon the assumption that the Board would not misrepresent them. We believe the effort to ground certiorari on facts outside the record is wholly improper in this instance, as it would be if any other litigant or lawyer asserted that injustice was done because his batting average in the Fifth Circuit was adverse.

It will be observed that in discussing the action of other Circuit Courts, the Board does not cite authorities or make an effort to show that the decisions of other Circuits are either right or wrong. It openly seeks review upon the ground that since the Fifth

Circuit statistics are not as favorable as the questioned statistics from other Courts, that the Fifth Circuit is necessarily ignorant or determined to defeat the law.

II.

The instant case was correctly decided in the Court below.

This case does not involve a contention on the part of the Respondent, nor a judicial determination, to the effect that mere compliance with the order of the Board is sufficient of itself to prevent a judicial decree of enforcement. Respondent filed (P.55) a motion pursuant to Sec. 10 (e) of the statute for leave to present additional evidence. (Appendix P. 9). As grounds for the motion Respondent alleged that the order of the Trial Examiner sought to be enforced had been rendered on December 18, 1947, one and a half years prior to the proceeding in the Court below. That following the order of the Board, Respondent accepted it, and posted the notices required by the Board. Respondent alleged that the parties met and exchanged proposals, and counter proposals, but did not reach an agreement. Respondent's motion said that the circumstances concerning the bargaining relation had substantially changed since the entry of the order of the Board, and that additional evidence should be taken for the Board to determine whether the order entered should now be revised or set aside to determine the question of whether the policies of the Act would be effectuated by a dismissal of the instant proceeding, or whether a

new collective bargaining election should be conducted by the Board, or what other changes in the order of the Board might be requisite to effectuate the policies of the Act.

The order in the instant case is prospective, that, is it directs the Respondent to bargain in the future with the certified union. The whole purpose of the statute is to permit the administrative agency to shape its orders to the objective of good labor relations and collective bargaining. Granted that the Board is not to be in any sense penalized for failure to secure enforcement of its order promptly, nevertheless the Board itself is entitled and required under its administrative practice to afford the employees full freedom, and is entitled and does in administrative practice revise and shape its orders under such facts by ordering new elections, decertifying bargaining agents or otherwise achieving the objectives of the statute. The order in question was predicated on labor relations far in the distant past. Respondent suggested material and relevant evidence to the establishing of sound statutory relations for the future, particularly relevant and material in a proceeding brought to secure future collective negotiations.

The authority on the question is NATIONAL LABOR RELATIONS BOARD V. INDIANA AND MICHIGAN ELECTRIC COMPANY, 318 US 9; 87 Law Ed. 579. In that case Mr. Justice Jackson held that an application of the type filed by Respondent in the instant case "was addressed to the sound judicial

(1) This court held in National Labor Relations Board v. Jones and Laughlin, 331 US 416; 91 Law Ed. 1575 @ 1582 that remand to the Board for post order fact findings is proper.

discretion of the Court;" that the question presented to the Supreme Court was whether the Court below had abused its discretion.

In the instant case we feel that no showing of abuse of discretion has been made or attempted. There is no claim that the facts alleged in Respondent's application to take additional evidence are not of concern to the Board nor any effort to show that the Board would not substantially reshape its order if in fact the parties have reached an impasse and, without interference by Respondent, the employees have withdrawn from the certified union. The ordinary course of the Board's procedure in such instances is to require fresh evidence that the ancient certification reflects a current majority, sometimes by ordering a new election, at other times by examining membership records. If in fact another union represents a portion of the employees, it too has rights under the statute. All of these matters are relevant and material not only to the Respondent and employees in establishing a sound relation, but to the Board in following its accepted administrative policy.

CONCLUSION

WHEREFORE, Respondent, Mexia Textile Mills, Inc., prays that the petition for certiorari be dismissed.

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Counsel for Mexia Textile Mills, Inc.

Samuels, Brown, Herman, and Scott
Of Counsel

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer -

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, U. S. C., II, Sec. 141, et seq.) are as follows:

* * * * *

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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STATEMENT

There is no issue as to the facts stated by Petitioner, except to point out that the failure to bargain case determined by the Board order related to various transactions between the Union and the Company commencing November 25, 1944. The Board order was dated July 2, 1948, more than four years after the opening of the bargaining relation and more than two years

after the termination of the strike which occurred in the plant of the Company (R. Page 19, et seq.). The form of the order of the Board dated July 2, 1948, was in accordance with the Board's policy directing the Company to bargain collectively with the certified Union (R. Page 36). The petition for enforcement of the order was filed in the court below April 11, 1949 (R. Page 38). Respondent filed its motion for the taking of additional evidence on May 18, 1949. The motion is set forth in full at Pages 55 through 58 of the record and this case turns on the contents of the motion and the question it presented to the court below. For the convenience of the Court, we reprint in the apendix to the brief the motion of Respondent here referred to. This brief Page 11.

It is important to call to the Court's attention the fact that the order was prospective in its nature, and if endorsed by the court, created a bargaining relation to continue in futuro.

SUMMARY OF ARGUMENT

I.

The motion of Respondent to take additional evidence under Section 10 (e) of the statute was addressed to the judical discretion of the court, and the burden is on the Board to show that the order of the court below is arbitrary, unreasonable, or an abuse of discretion. This burden has not been sustained.

II.

The change in the substantive law defining the bargaining relation, the lapse of time since the entry of the order of the Board, and the fact that following the order of the Board the Union and the Company had negotiated extensively without reaching an agreement, together with the fact that the developments since the order of the Board were unknown to the Board and might require the Board under its administrative policy to modify the order, sustained the discretion of the court below in directing an inquiry into the developments since the order of the Board.

ARGUMENT

Respondent does not contend here and did not contend in the court below that compliance with the order of the Board is a defense to the enforcement proceedings filed by the Board. The court below did not hold that compliance with an order of the Board was a defense to its enforcement, as the court below has carefully explained in *National Labor Relations Board V. The Cooper Co., 179 Fed. 2d 241.* There, in commenting upon the decision in the instant case, the court below said:

> "Indeed, nothing was decided there (speaking of the Pool and Mexia cases). The Court, expressly deferring decision, merely referred the matter back to the Board for its assistance in furnishing further information and for its recommenda-

tions or requests in the light of such further information."

The bulk of Petitioner's brief is consumed with proving what is admitted in the case at bar.

Nor is there involved in the case at bar a denial by the court below of enforcement of the order of the Board. There is no frustration of the administrative wisdom and expertness of the Board. The attack made upon the court below in the petition for certiorari and the plaintive plea that the Board proceeding has become a merry-go-round are inappropriate to the unvarnished facts. Here as in most cases the facts and record are more important than generalities, and the actual situation in the court below must be viewed from its perspective to evaluate its order properly.

So considered the court below was right. First it is apparent that Respondent had in good faith accepted and complied with the order of the Board. This statement is made not by way of defense to the compliance proceeding, but solely as a statement of fact which was before the court below and supported by the letter of the Respondent shown at page 57 of the record, and reprinted in the appendix to this brief as a part of Respondent's motion. Respondent's letter to the Union at the time the order of the Board was accepted makes it perfectly plain that the issue which had barred an agreement in the ancient negotiations had been the Union requirement that non-union employees be discharged. Under the Labor Management

Relations Act of 1947, the one sided bargaining which had prevented an agreement between the parties in 1945, appeared to have been changed to a reciprocal requirement of bargaining in good faith. In that spirit, Respondent said, it was "more than willing to accept the recommendations of Mr. Lindener and post the notice he requests in our plant" (R. Page 58). That letter demonstrated no intransigent attitude, but rather a wholehearted desire to bargain in the spirit of the statute and reach an agreement.

Following that letter, Respondent's motion showed that it had extensively bargained with the Union, but that no agreement had been reached (R. Page 56), and that Respondent was now concerned as to whether the Union in fact represented its employees. Respondent suggested in its motion "that the Board should now take into account the existing facts and circumstances in the plant of the Respondent and determine whether the policies of the Act will be effectuated by a dismissal of the instant proceeding before the Board, or whether a new collective bargaining election should be conducted by the Board or what other changes in the order of the Board may be requisite to effectuate the policies of the Act." (R. Page 56). Bearing in mind that the order before the court had the effect of cementing a future relation between the Union and the Company, it is plain that the facts before the court below were appropriate for the exercise of further administrative assistance. All of the considerations mentioned by the Board in its brief, to-wit, the possibility of resumption of the unfair labor practice, the possibility

of delay in the judicial requirement of bargaining, vanish as judicial factors in the light of the facts. The court below was right in feeling that the situation presented to it, particularly in the radical changes made in State and Federal law since the bargaining in question, justified the court in calling upon the Board for its administrative wisdom before providing judicial sanctions to an order which may have become inappropriate and moot.

In fact the action of the court below would have expedited Board policy and brought it to its proper culmination under the statute. If the Board, after considering the developments since the record was closed, felt that judicial enforcement was appropriate, there is little doubt that the court below stood ready to grant enforcement. If in fact the Board, after taking cognizance of the situation, desired in its administrative wisdom to alter its order, then the Board would have achieved a signal step towards effectuating its policies. For an order which had become inappropriate could be modified and enforced without the delay of new proceedings before the Board.

Tested by established principles of law, the court below was right. Only three decisions of this Court throw light upon the question.

The first opinion is *Southport Petroleum Co. v. National Labor Relations Board, 315 U.S. 100-109; 86 Law Ed. 718.* This Court held that an application to take additional evidence under Section 10 (e) of the

statute was addressed to the sound judicial discretion of the Circuit Court. There the Circuit Court had held that the proffered evidence was not material and this Court held that upon such finding the Circuit Court properly denied the application to take additional evidence.

In *National Labor Relations Board v. Indiana and M.E. Co., 318 U.S. 9-36; 87 Law Ed. 579*, the Court concisely stated the governing law relative to the proceeding in the case at bar:

> "Section 10(e) of the National Labor Relations Act authorizes the Circuit Court of Appeals to order additional evidence to be taken when it is shown 'to the satisfaction of the court that such additional evidence is material,' and that there were reasonable grounds for the failure to adduce the evidence at the hearing. In Southport Petroleum Co. v. National Labor Relations Bd. 315 US 100, 104, 86 L ed 718, 723, 62 S Ct. 452, we sustained the Board's contention and held that an application for leave to adduce additional evidence thereunder 'was addressed to the sound judicial discretion of the court.' The Board does not suggest that a different construction should be put upon the Act when the court below decides against, rather than for it. The question it has submitted for our decision is whether the court below 'acted arbitrarily' and 'abused its discretion.' Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence

of dynamiting would be a matter of indifference in our own view of the case, but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must not only have been in error but must also have abused its judicial discretion."

It came before this Court again in *National Labor Relations Board v. Donnelly Garment Co., 330 US 319; 91 Law Ed. 854.* There the Circuit Court had found a change in circumstances rendering evidence now relevant which had been irrelevant at the first hearing. This Court explained that in the Indiana and Michigan case developments occurring since the order, considered in the light of the circumstances before the Circuit Court, had justified it in requiring additional testimony and that it had not abused its discretion. It made it plain that Section 10(e) of the statute did not justify "reversals" for the purpose of granting a new trial, but additional evidence only upon relevant matters relating to the order itself.

The real question in the case at bar is the question of fact and logic involved in determining whether the radical change in circumstances since the order of the Board might justify a different administrative policy than the order expressed. It appears that the Board had no knowledge of the changed circumstances, but

had perfunctorily sought enforcement for the simple reason that no agreement had been reached between the parties since the order of the Board. The relevance of the developments is plain. If in fact the parties had been unable to reach an agreement after mutual negotiations in good faith, then the ancient certification under Board policy might be disregarded by any other Union, or by the Company. Following a genuine impasse, judicial enforcement and the "potential threat of contempt proceedings" would not only fail to effectuate the policy of the Board, but subject the Respondent to unjustified expense in re-litigation of the preceding bargaining sessions. It is, of course, no answer to the problem of the Respondent, and the wisdom of the court below, for the Board to suggest that it would probably not institute contempt proceedings if the facts in the motion were correct. Nor does it justify the Board in seeking enforcement of an archaic order, where the circumstances have radically changed, to explain that Respondent would probably not be in contempt of court for violating it. The court below was called upon to render its own order, an order carrying its command of obedience. That court was justified in its desire that its order not put the Respondent to the necessity of violation. The short of the matter is that the court felt that the Board's administrative policy should be brought to bear upon the developments occurring since the rendition of the ancient order. That is judicial discretion, exercised with the enlightment of the pronouncements of this Court. It should not be frustrated by distorting it into a ruling that compliance

with the order itself is a defense. That is not what the court held, nor what the case involves.

Respondent prays that the order of the court below be affirmed.

JOHN M. SCOTT
Attorney for Respondent

Of Counsel:
Samuels, Brown, Herman & Scott
1210 Electric Bldg.
Fort Worth, Texas

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

Motion of Mexia Textile Mills, Inc. for the Taking of Additional Evidence, and in Response to Petitioner's Motion for Summary Decree — Filed May 18, 1949.

(File Endorsement Omitted)

(Title Omitted)

On December 18, 1947, the trial examiner issued an intermediate report on the above case, recommending that Respondent post the usual notices and enter into collective bargaining with the Union. On December 31, 1947, Respondent posted the notice to employees as recommended by the trial examiner, and directed a letter to the Regional Director of the National Labor Relations Board, a copy of which letter is attached to this motion.

1.

Thereafter in the early part of the year 1948, Respondent entered into good faith bargaining with the Union and a number of meetings were held during the year 1948. The parties negotiated extensively and exchanged various proposals, looking to the execution of a written agreement, but no final contract has yet been reached.

2.

A complete stenographic transcript of the meet-
89 ings held during the year 1948 has been kept and preserved, and the Union has adopted an arbitrary, capricious and intransigent attitude which has prevented an agreement.

3.

Respondent alleges that it does not in good faith believe that the Union is now the collective bargaining representative, within the meaning of the National Labor Relations Act, for the majority of the employees within Respondent's plant. Respondent alleges that the collective bargaining relations that has existed since Respondent accepted the order of the Board is not reflected by the order of the Board, or in the record in the instant proceeding, and that the Board has no official knowledge of the facts and circumstances herein set forth by Respondent. That these facts and circumstances have occurred since the record in the instant case was closed and that Respondent was therefore unable to present these facts to the Board for its consideration. That the case has become moot by reason of the facts and circumstances hereinabove set forth. That the record in the instant proceeding relates to facts and transactions which occurred during the years 1945 and 1946, and particularly to a strike that occurred at about that time. That the Board should now take into account the existing facts and circumstances in the plant of the Respondent and determine whether

the policies of the Act will be effectuated by a dismissal of the instant proceeding before the Board, or whether a new collective bargaining election should be conducted by the Board, or what other changes in the order of the Board may be requisite to effectuate the policies of the Act.

WHEREFORE, Respondent prays that the Court direct the Board to reopen this case for the purpose of permitting Respondent to offer the additional evidence referred to in the above motion.

Respectfully sùmbitted,

MEXIA TEXTILE MILLS, INC., *Respondent*

By SAMUELS, BROWN, HERMAN & SCOTT
JOHN M. SCOTT
JOHN M. SCOTT
1210 Electric Building
Fort Worth, Texas

90 *Duly sworn to by John M. Scott.*
Jurat omitted in printing. (All in italics.)

91 Dr. Edwin Elliott, Regional Director
National Labor Relations Board
1101 T & P Building COPY
Fort Worth, Texas

Re: Mexia Textile Mills, Inc.
Case No. 16-C-1301

Dear Doctor Elliott:

We have received a copy of the recommendations of Mr. Sidney Linder concerning the hearing held in

Mexia in August of 1947, relation to our relations with the CIO during the years 1945 and 1946.

At the time the hearing was held the company did not see fit to argue with Mr. Schuler, the union representative, concerning the disagreements and strikes which even at that time involved matters two years old, and we can understand that since the company d idnot offer witnesses, Mr. Lindner's recommendations are based entirely on Mr. Schuler's contentions.

Be that as it may, however, the company's policy always has been that the employees have a right to belong to the union if they see fit and that they have a right to refuse to belong to the union if they see fit. At the time we put into effect the wage increases given our employees during the war period, we were of the opinion that they were justified and that the employees needed the increases. The failure to agree upon a contract with the union then was caused principally by the fact that the union insisted on requiring our employees to remain members or lose their jobs and the company never did see fit to agree to such a proposal.

All of that, however, is water under the bridge. The National Labor Relations Act provides now, as we understand it, that neither side can make the other give any concessions and that the bargaining will be carried on free of intimidation and threats from either the union or the company. In such a spirit we are more than willing to accept the recommendations of Mr.

Lindner and post the notice he requests in our plant. We are sending a copy of this letter to each of our employees, together with a copy of the notice, and forthwith posting it in our plant as requested by Mr. Lindner.

We are likewise sending a copy of this letter to the Union representative, Mr. Schuler. We assure you and Mr. Schuler that there are no hard feelings on the part of the company regarding the difficulties of 1945 and 1946, and we trust that our relations may be friendly in connection with such matters as Mr. Schuler may want to present to us in the future.

Yours very truly,

MEXIA TEXTILE MILLS

By

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer-

* * * * *

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, et seq.) are as follows:

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropri-

ate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript.* * *